TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER [redacted] 1920

No. [redacted]377

GEORGE D. HORNING, PETITIONER,

vs.

THE DISTRICT OF COLUMBIA.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

PETITION FOR CERTIORARI FILED MARCH 24, 1921.

CERTIORARI AND RETURN FILED APRIL 18, 1921.

(27,310)

(27,010)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 924.

GEORGE D. HORNING, PETITIONER,

vs.

THE DISTRICT OF COLUMBIA.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 3, 1919.

a *Transcript of Record.*

Court of Appeals of the District of Columbia, October Term, 1918.

No. 3213.

No. 21, Special Calendar.

GEORGE D. HORNING, Plaintiff in Error,

vs.

DISTRICT OF COLUMBIA.

In Error to the Police Court of the District of Columbia.

Filed October 8, 1918.
Printed October 18, 1918.

1 Court of Appeals of the District of Columbia.

No. 3213.

GEORGE D. HORNING, Plaintiff in Error,

vs.

DISTRICT OF COLUMBIA.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Robert Hardison, Judge of the Police Court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Police Court, before you, between District of Columbia, Plaintiff, and George D. Horning, Defendant, Information No. 523537, a manifest error hath happened, to the great damage of the said Defendant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Court of Appeals of the District of Columbia, together with this writ, so that you have the same in the said Court of Appeals, at Washington, within 15 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Court of Appeals

may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Constantine J. Smyth, Chief Justice of the said Court of Appeals, the 1st day of October, in the year of our Lord one thousand nine hundred and eighteen.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by
CONSTANTINE J. SMYTH,
Chief Justice of the Court of Appeals of the District of Columbia.

2 [Endorsed:] Filed Oct. 1, 1918. F. A. Sebring, Clerk Police Court, D. C.

DISTRICT OF COLUMBIA, Plaintiff in Error,

vs.

GEORGE D. HORNING.

In the Police Court of the District of Columbia, October Term, 1917.

No. 523,537.

DISTRICT OF COLUMBIA

vs.

GEORGE D. HORNING.

Information for Violation of Act of Congress Approved February 4, 1917.

Be it remembered, That in the Police Court of the District of Columbia, at the City of Washington, in the said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above entitled cause, to wit:

In the Police Court of the District of Columbia, July Term, A. D. 1917.

DISTRICT OF COLUMBIA, *ss:*

Conrad H. Syme, Esq., Corporation Counsel, by Percival H. Marshall, Esq., Assistant Corporation Counsel, who, for the District of Columbia, prosecutes in this behalf, comes here into Court, and causes the Court to be informed, and complains that George D.

Horning, late of the District of Columbia, in said District of Columbia, on the first day of February, in the year A. D. nineteen hundred and seventeen, and on divers other days between the said date and the filing of this information, did then and there maintain a certain place of business at 9th and D Streets, Northwest, in the City of Washington, upon the exterior of which place of business, and so as the same could be read by passersby upon the public streets of the said City of Washington, said George D. Horning did maintain and permit the following signs, viz:

3

"Warehouse."

"Formerly Loan Office George D. Horning."

"Branch Office, Dime Messenger Service, Inc., Bonded Messengers."

"Automobiles Leave Every Ten Minutes."

"Loans on Diamonds, Watches, Jewelry."

"Diamonds—Horning's Collateral Bank—Jewelry."

"Now making loans at my Virginia Office—Free automobile service between offices."

and in the exterior of which place of business did maintain and permit the following signs, viz:

"*Notice.*

This establishment is exclusively for storage purposes, and for the settlement of loans made prior to March 7, 1913; no application for loans will be received or considered here, and no examination, appraisement or valuation of pledges will be made here.

"GEORGE D. HORNING.

"DIME MESSENGER SERVICE, INCORPORATED."

said last mentioned sign being located over a certain desk in said place of business used by permission of said George D. Horning, and as his tenant for hire, by a certain corporation known as the Dime Messenger Service, Incorporated.

That the said Horning had no financial interest in the corporation known as the Dime Messenger Service, as stockholder or otherwise, except that he hired space to the corporation for its business at 9th and D Streets; that the Dime Messenger Service Corporation is a genuine and bona fide Dime Messenger Service, doing a general messenger service through the City with a branch office at said 9th and D streets, for which it paid said Horning a monthly rental, and with its main office at Number 717 Twelfth Street, Northwest in said City of Washington, District of Columbia; that at said branch office, at the times aforesaid, it received, accepted and filled orders for messenger service generally from business men and others in the neigh-

borhood, calling for the delivery by messengers of letters and parcels throughout the City to various addresses.

That said George D. Horning, at the times aforesaid, caused to be published in certain newspapers, in general circulation in the District of Columbia, the following advertisement, viz:

"Loans

Horning,

Relee, Va. (South end of Highway Bridge).

Free automobile from 9th and D Sts. N. W."

4 And in certain other newspapers in general circulation in said District of Columbia the following advertisement, viz:

"Horning.

Loans, Diamonds, Watches, Jewelry.

Free auto service from northeast corner 9th and D Sts. N. W."

That at the times aforesaid said George D. Horning also owned and maintained certain passenger automobiles, and caused the same to be operated in the manner hereinafter set forth between the aforesaid place of business, and a certain other place of business conducted by the said George D. Horning, in the County of Alexandria, State of Virginia.

That on divers days between said first day of February, A. D. 1917, and the date of the filing of this information, divers persons who desired to obtain loans of money, upon security, applied for such loans at the aforesaid place of business of said George D. Horning, at 9th and D Streets, Northwest, in the City of Washington, District of Columbia, to an agent and employee of said George D. Horning duly authorized by him to act and speak for him in the manner hereinafter set forth as acted and spoken by said agent and employee, and stated to said agent and employee in substance that they, said persons who desired to obtain loans of money upon security, as aforesaid did desire to obtain loans of money upon security, and exhibited to said agent or employee, sundry articles of jewelry, and requested of said George D. Horning, through his said agent and employee, loans of money, and offered to pledge with said George D. Horning articles of jewelry exhibited by them as aforesaid, as security for the loans of money so requested by them, and to be informed of the sums of money which would be loaned to them by said George D. Horning upon the security of said jewelry, if pledged as aforesaid, and were told by said agent and employee that said articles of jewelry could not, under the law, and would not be appraised or valued for loan purposes, in the District of Columbia, and that no loans upon the security thereof would be made in the District of Columbia, but that said persons so offering the same as security for loans might either send said articles of jewelry from said

place of business of said George D. Horning, located at 9th and D Streets, Northwest, in the City of Washington, District of Columbia, for hire to be paid by the sender, by the agents of the Dime Messenger Service, Incorporated, located in said last mentioned place of business, as aforesaid, or take the same in person therefrom to the place of business operated by said George D. Horning, in Alexandria County, Virginia, as aforesaid, in any of the aforesaid passenger automobiles operated by said George D. Horning, without charge or payment of any fare, compensation or reward for being carried and transported in said automobiles, from said place of business of said George D. Horning, in the City of Washington, District of Columbia, to his said place of business in Alexandria County, Virginia, and return; or might take or send said articles desired to be pledged as aforesaid, by public conveyance or otherwise, to said Virginia office of said George D. Horning, at which last mentioned office all loans were made.

That thereupon certain of said persons who desired to obtain loans of money as aforesaid, delivered their respective articles of jewelry to the agents of said Dime Messenger Service, Incorporated, at its aforesaid place of business in the office or place of business of said George D. Horning at 9th and D Streets, Northwest, in the City of Washington, District of Columbia, to be taken or carried therefrom by messenger in the employ of said Dime Messenger Service, Incorporated, to the aforesaid place of business of said George D. Horning in Alexandria County, Virginia, and said persons, at the time of delivery by them of said articles of jewelry to said agent, respectively stated to him the amount of money which they desired to borrow upon the security of said jewelry, and each was given by and received from said agent of the said Dime Messenger Service, Incorporated, a ticket, or receipt, in writing or in printing, or writing and printing, containing a number for the purpose of identifying the article or articles so receipted for; and thereafter said articles were taken or carried by said messenger, to the place of business of said George D. Horning, in Alexandria County, Virginia, where they were received and pawn tickets therefor delivered to said messenger, together with the respective sums of money loaned upon the security of said articles, which pawn tickets and sums of money were by said messenger brought back to the aforesaid office of said Dime Messenger Service, Incorporated, in the City of Washington, District of Columbia, and by said corporation delivered to the persons entitled thereto, who surrendered therefor the identification receipts aforesaid, and paid the said Dime Messenger Service, Incorporated, for said messenger service, the sum of ten cents. And others of the persons who desired to obtain loans of money as aforesaid, took their said articles which they desired to pledge as security for said loans, in person, in the passenger automobiles operated by said George D. Horning as aforesaid, and were carried and transported in said automobiles, without expense to them, by invitation of said George D. Horning, as aforesaid, and with his employees in charge of said automobiles, from his said place of business at 9th and D Streets, Northwest, in the City of Washington, District of Columbia, to his said

place of business in Alexandria County Virginia, where they and each of them obtained from said George D. Horning, loans of money upon the security of their respective articles of jewelry, which they then and there respectively pledged and pawned with said George D. Horning, and received therefor written or printed, or written and printed, pawn tickets for the purpose, among others, of identifying said articles and facilitating the redemption thereof, and thereupon were carried and transported, in said automobiles, by invitation of said George D. Horning, from his said place of business in Alexandria County, Virginia, to his said place of business at 9th and D Streets, Northwest, in the City of Washington, District of Columbia, or elsewhere in the said District, without demand of them or payment by them of any fare, compensation or reward for being
6 carried and transported in said automobiles as aforesaid. And thereafter, the persons who had obtained from said George D. Horning, loans of money upon security in the manners and by the methods hereinbefore described, applied at the office or place of business aforesaid in Washington, District of Columbia, to redeem their said respective pledges, and thereupon were informed by the agent and employee of said George D. Horning, authorized as aforesaid, that said pledges could be redeemed only at the place of business of said George D. Horning in Alexandria County, Virginia, and that said persons so applying to redeem said pledges could do so by sending their respective pawn tickets from said place of business of said George D. Horning, located at 9th and D Streets, Northwest, in the City of Washington, District of Columbia, for hire to be paid by the senders, by the agents of the aforesaid Dime Messenger Service, Incorporated, located in the said last mentioned place of business, as aforesaid, or take the same in person therefrom to the place of business operated by said George D. Horning in Alexandria County, Virginia, as aforesaid, in any of the aforesaid passenger automobiles operated by said George D. Horning, without charge or payment of any fare, compensation, or reward for being carried and transported in said automobiles, from said place of business of said George D. Horning, in the City of Washington, District of Columbia, to his said place of business in Alexandria County, Virginia, and return or might take or send articles desired to be pledged as aforesaid by public conveyance or otherwise, to said Virginia Office of said George D. Horning, at which last mentioned office all loans were required to be paid. And certain of said persons who had procured loans as aforesaid, sent their respective pawn tickets hereinbefore mentioned, by messenger in the employ of said Dime Messenger Service, Incorporated, from its aforesaid place of business in the office or place of business of said George D. Horning, at 9th and D Streets, Northwest, in the City of Washington, District of Columbia, to the place of business of said George D. Horning in Alexandria County, Virginia, together with the principal of thei- respective loans and interests thereon at the rate of three per cent per month, or fractional part of a month, from the respective dates of said loans to the dates of payment aforesaid, which principal and interest were paid to and received in the said State of Virginia by said George D.

Horning, to whom said pawn tickets were also delivered, and surrendered by said messenger.

And thereupon said George D. Horning delivered to said messenger in return therefor and for each pawn ticket surrendered as aforesaid a written or printed or written and printed, paper, warehouse receipt, or ticket, designated by said George D. Horning, as a redemption certificate, to be delivered by said messenger to the person surrendering the pawn ticket issued for said article or articles, which gave the pledge number of the article or articles pledged or pawned as aforesaid, and recited that the bearer was entitled to have the same delivered to him on presentation thereof, and gave the number of the safe, and the number of the compartment therein, in which it
7 was stored, which safe was not within the State of Virginia, but in the District of Columbia, as hereinafter set forth. And said messenger thereupon delivered said redemption certificates at the place of business of said George D. Horning at 9th and D Streets, Northwest, in the City of Washington District of Columbia, to the persons thereto entitled, who paid to said Dime Messenger Service, Incorporated, for said messenger service the sum of ten cents, and thereupon presented their respective redemption certificates to the agent and employee of said George D. Horning, at his said last-mentioned place of business, and upon the surrender thereof received from said agent and employee, acting by authority from and on behalf of said George D. Horning, their respective articles of jewelry by them pledged and pawned as aforesaid, which said articles, together with all other articles accepted by said George D. Horning, upon pledge or pawn, were by him sent from his said place of business in Alexandria County, Virginia, to his aforesaid place of business at 9th and D Streets, Northwest, in the City of Washington, District of Columbia, and were by him thereafter kept throughout the continuance of the pledge or pawn thereof at said last mentioned place of business, which was used by him as a warehouse for all goods in his custody and possession upon pledge or pawn.

And others of said persons who had procured loans as aforesaid, took their respective pawn tickets hereinbefore mentioned, in person in the passenger automobiles operated by said George D. Horning, as aforesaid, and were carried and transported in said automobiles, without expense to them, by invitation of said George D. Horning, as aforesaid, from his said place of business at 9th and D Streets, Northwest in the City of Washington, District of Columbia, to his said place of business in Alexandria County, Virginia, where said other persons paid to said George D. Horning, who accepted and retained the same, the respective principal sums to each of them loaned by him as aforesaid, together with interest thereon at the rate of three per cent per month, or fractional part of a month from the respective dates of said loans to the dates of payment aforesaid, and delivered and surrendered to him their respective pawn tickets hereinbefore described, whereupon said George D. Horning delivered to each of said other persons who surrendered a pawn ticket as aforesaid, a written or printed, or written and printed paper, or ticket, or warehouse receipt, designated by said George D. Horning, as a redemp-

tion certificate, for the purpose among others, of identifying the articles pledged or pawned, as aforesaid, by the person to whom the said redemption certificate was so delivered, and of facilitating the redemption thereof, and said holders of said redemption certificates thereupon were reconveyed, carried and transported, from said place of business in Alexandria County, Virginia, to the said place of business of said George D. Horning, at 9th and D Streets, Northwest, in the City of Washington, District of Columbia, without demand of them or payment by them of any fare, compensation, or reward, for being carried and transported in said automobiles, as aforesaid and at said last mentioned place of business they surrendered their respective redemption certificates aforesaid to the agent and employee of said George D. Horning, and upon the surrender thereof
8 received from said agent and employee, acting by authority from and on behalf of said George D. Horning, their respective articles of jewelry, which together with all their articles accepted by said George D. Horning, upon pledge or pawn, were by him kept after the receipt in said State of Virginia throughout the contrivance of the pledges and pawn thereof, at said last mentioned place of business, which was used by him as a warehouse for all goods in his custody and possession upon pledge or pawn as aforesaid.

That the said Horning for a long time prior to the Fourth day of February, 1913, conducted the business of a licensed pawnbroker at said Ninth and D Streets, in the District of Columbia; at a large expense he had previously thereto installed in his said place of business eight fire and burglar-proof safes for the purpose of keeping and storing articles taken in pledge pursuant to his business as a pawnbroker; that when the Act of Congress was passed reducing the amount of interest charged from three to one per cent, the said Horning obtained a license under the laws of the State of Virginia and established an office in the County of Alexandria to conduct the pawnbroking business under said license. That all the books of account pertaining to the said pawnbroking business were kept at this office in the State of Virginia; that the only purpose for which the fire and burglar proof safes were used in Horning's office at Ninth and D Streets was to safe keep the articles pledged by persons or their agents at Horning's place of business in Virginia because there was no police protection there.

That at no time between the said first day of February, A. D., Nineteen Hundred and Seventeen, and the date of the filing of this information did said George D. Horning, or anyone in his behalf make any loan of money in the District of Columbia or receive payment in the said District of any loan made by him in the State of Virginia, or elsewhere, or accept or receive in said District any article or thing pledged to secure the payment of any loan made by him; nor did he return or surrender in said District any article or thing so pledged with him, until after the loan to secure which it was pledged had been paid in the State of Virginia, and then only on presentation at his said place of business at said Ninth and D Streets, Northwest, of a warehouse receipt or redemption certificate issued in Virginia upon the payment of the loan there, nor did he, or anyone

in his behalf, in said District of Columbia, appraise or value for the purpose of making a loan, or for any other purpose or cause to be appraised or valued, for said purpose, or any other purpose, any article or thing thereafter accepted by him in the State of Virginia as security for a loan made there.

That between said February 1, 1917, and the filing of this information the Western Union Telegraph Company and the Mutual District Messenger Co., each a corporation having a place of business in said District of Columbia, performed a like service for their customers as that performed by the said Dime Messenger Service for its customers as hereinbefore set forth.

And by reason of all of the premises, said George D. Horning did then and there, in the District of Columbia, engage in the business of loaning money on security, and did charge and receive
9 upon said money so loaned a rate of interest greater than six per cent per annum and had not first procured a license so to do, and was not then and there engaged in the legitimate business of a national bank, licensed banker, trust company, savings bank, building and loan association, or real estate broker, as defined in the Act of Congress approved July 1, 1902, contrary to and in violation of the Act of Congress, approved February 4, 1913, in such case made and provided, and constituting a law of the District of Columbia.

CONRAD H. SYME,
Corporation Counsel,
By PERCIVAL H. MARSHALL,
Assistant Corporation Counsel.

Personally appeared Charles A. Evans, this 13th day of July, A. D. 1917, and made oath before me that the facts set forth in the foregoing information upon his personal knowledge are true, and those stated upon information and belief he believes to be true.

R. B. GOTT,
Deputy Clerk, Police Court
of the District of Columbia.

June 8, 1918. Plea of "not guilty" entered and a jury trial demanded.

June 29, 1918. Verdict "guilty."

In the Police Court of the District of Columbia.

No. 523,537.

DISTRICT OF COLUMBIA
vs.
GEORGE D. HORNING.

Defendant's Bill of Exceptions.

At the trial of the above-entitled cause on June 25, 26 and 27, 1918, before the Honorable Robert Hardison, Judge of said Court,

and a jury, the District of Columbia, to maintain the issues on its part joined, offered and gave testimony as follows:

By WILLIAM L. WASHINGTON.

On direct examination:

He is a teacher and social worker, and a resident of the District of Columbia; does not know defendant. Being asked, whether defendant has a place of business in this jurisdiction, defendant by his counsel objected upon the ground that if witness does not know defendant he can not know that defendant has a place of business otherwise than by some information not his own, which objection was overruled by the Court and exception to such action taken by defendant; whereupon witness answered. "He has a place of business at 9th and D, northwest," which answer defendant by his counsel moved to strike out for the same reason that he objected to the question, which motion was overruled and exception taken by the defendant to the action of the Court. Witness proceeding: visited 9th and D Sts., Northwest, went into the office there, the office of defendant, February 3, 1917, went there for the purpose of securing a loan of money on an article of jewelry; found present two clerks, one standing behind a long desk facing 9th St., addressed him, telling him that witness wished to secure a loan on a pair of cuff links; the clerk replied that he did not make loans in the District of Columbia but if witness would go to defendant's office in Virginia he could secure a loan there; witness asked how he might secure it and the clerk said "We have a free automobile service or Dime Messenger Service to Mr. Horning's office in Virginia, either of which you can use to secure the loan," the clerk at the opposite desk he said would attend to the matter for witness; witness then addressed the latter and told him he wished to secure a loan; this clerk asked witness how much and on what kind of an article, and witness told him $5 on a pair of cuff links which witness gave him; the clerk took the cuff links and placed them in an envelope and gave witness a receipt for them, and sent the cuff links to the Virginia office, witness presumes, by the Dime Messenger Service; witness subsequently in defendant's office saw the man to whom he had given the cuff links; witness had left the office and returned within an hour and presented to the second clerk of whom he spoke the receipt and the latter gave him an envelope containing $5, together with a ticket which was presented on another date at the same office for the purpose of redeeming the pledge so that witness has not possession of the ticket. Witness does not know who the man was to whom he delivered the cuff links, might recall him if he saw him personally; does not recall whether he saw a sign of the Dime Messenger Service on the inside of the establishment, saw such a sign on the outside of the building. He presented the receipt to the second clerk of whom he spoke, who was behind the smaller desk facing the longer desk; he gave witness an envelope containing $5 and the pawn ticket, which

witness took and left the office. Witness again visited the premises at 9th and D Sts., on February 7, 1917, for the purpose of securing a loan of money on a watch charm; addressed the clerk who sat behind the long desk facing 9th St. and told him that he wanted to borrow some money on a watch charm which witness presented to him and he replied by saying that he did not make loans in the District of Columbia; after he had looked at the charm a while witness asked him if the charm was not jade and what its value was, he replied by saying he did not know what kind of a stone it was or its value, but if witness took it to the Virginia office they would tell him over there what kind of a stone it was and also its value, and witness could secure a loan there; witness asked how and the clerk said the automobile would leave about three o'clock, witness could go over in that; witness got aboard the automobile, which was standing outside of the office at that time, went
11 to defendant's office in Virginia and found there a clerk to whom witness presented the watch charm and told him he wanted to secure a loan on it; the clerk looked at the charm, took it in the rear part of the office, returned and said that he could loan witness $2.50 on it; witness asked him if it was not jade, and if jade was not valuable, and if that was the best he could do for witness; the clerk replied, yes it was jade, but jade did not have any loan value but the gold with which it was bound had a loan value of $2.50; he gave witness the $2.50 and also a ticket and witness boarded the automobile and was brought back into the city; no charge was made witness for the automobile trip from 9th and D Sts. to the Virginia office and back; on February 3, a charge of ten cents was made. Witness visited 9th and D Sts., Northwest, on April 11, 1917, and saw the first clerk that he spoke of behind a long desk facing 9th St.: witness presented to him the two pawn tickets saying he wished to redeem the pledges and paid the clerk $10; the clerk did not receive the money, he directed witness to the second clerk, saying that he would attend to the matter for witness. Not wishing to use the Dime Messenger Service, witness took free automobile again and went to defendant's Virginia office where he presented his two pawn tickets to a clerk there, telling him that he wished to redeem the pledges; the clerk went into the rear of the office and returning said that the amount which had been loaned plus the interest was $8.19, which witness paid; witness presented the tickets to the clerk who gave witness two other tickets certifying that pledges had been redeemed, two redemption tickets, and told witness to carry them to the office in Washington at 9th and D; witness returned by the free automobile service, presented his tickets there to the first clerk of whom he spoke, who delivered to witness the two articles, the watch charm and cuff links, which he took from a box in an iron safe there behind the long desk where he was standing; for the return of that property witness gave the clerk the two redemption tickets. The pawn ticket in the first instance certified that defendant had loaned to "W. Yelp," not to witness, the sum of $5 on a pair of cuff links, at the rate of 3% a month or fraction thereof; witness did not give the name of

W. Yelp but gave his own name; does not know why the ticket was given to him in the name of W. Yelp. Asked why he used the term "Dime Messenger Service," witness answered that that service was offered, he was offered the use of the Dime Messenger Service or free automobile service by the first clerk of whom he spoke.

On cross-examination:

By social worker witness means he is the resident worker of the Colored Social Settlement, 18 L St., Southwest; he went to the office at 9th and D Sts. for the purpose of securing a loan: is a social worker in the Southwest down there, and was interested in litigation pertaining to what is known as the loan shark law; is there for the purpose of elevating, helping his people, a large number of whom were patrons of the loan establishments throughout the city and certainly would gain thereby from litigation that had for its purpose the regulating of the loaning of money in the District of Columbia; he
12 saw through the papers that loans were being made, and perhaps the law was being violated, and he volunteered his services to procure whatever information or data he could to prevent such violations; went there to secure information, can't say that he went there for the purpose of using it for prosecution of defendant, if it was of any value to anyone that wanted to use it for the prevention of the violation of the law to give the information to him, intended to do that when he went there. Does not know defendant, knows that that is his office there, the business is transacted there in his name, does not know this except by way of representation, sign, saw a sign there with defendant's name on it. The place is located at the Northeast corner of 9th and D Sts., Northwest; it has two desks within, one a long desk which faces 9th St., a smaller desk faces the much longer one; counter would be a better description of the longer one, counter with a top of wire cages, very similar to a bank, behind it are burglar proof and fire proof vaults for the storage of articles, that is on the right as you enter. Behind the counter when he went in there was one person, does not know who he was, and at the other desk there was one, and there seemed to be a person there who was performing the duties of a porter at the door, and on the first occasion he saw another person there whom he judged to be a messenger; saw the Dime Messenger sign on the outside, if there was one on the inside does not recall having noticed it, does not recall having seen it on either occasion that he was there. When he went in there his first application was to the man behind the counter, he went there for the purpose of exhibiting the pair of cuff buttons with the idea of getting a loan, broached the subject to the man behind the counter and he told witness that no loans were made in that office; then the man said "we make no loans in the District of Columbia, but if you will take the articles to our Virginia office across High Bridge you can secure a loan there"; then witness asked him how he might secure the loan; this after the man told him they made no loans in the District of Columbia; the man was the first to speak, witness asked the man how he, the witness, might secure the loan after the man volunteered the information that the witness could get

it; he referred witness to the young man sitting at the desk, he said "the clerk across the way there will attend to the matter for you," does not recall whether he said "clerk" or "gentleman" or what but he referred to the person behind the desk; does not recall having seen a sign behind the desk, a sign, "Dime Messenger Service." After having thus referred him, the man told witness that he would take his commission for him and charge him ten cents for going to Virginia and coming back. Witness gave the cuff buttons to this man who gave them to a third man that witness took to be a Dime Messenger. Witness did not notice carefully whether the receipt given him for the cuff buttons in the first instance was the Dime Messenger receipt or not, does not recall perusing that carefully but knows the man gave him a receipt, did not examine it so as to know what its contents were; while he remembers the pawn ticket clearly enough he does not remember the original receipt which was the evidence given him that his article was in the possession of somebody else; witness was there for the purpose of getting information that would
13 make a case against defendant and read the paper that was brought him from Virginia very carefully but did not read the original paper that started the transaction so as to tell what was in it. Does not remember signing any paper before he got the pawn ticket and the $5, but does not deny it. With reference to the first ticket, the pawn ticket which he received at the Virginia office, the name on that ticket was written "W. Yelp"; the young man at the Messenger Service Desk who took his cuff buttons wrote witness's name in the receipt which he gave, wrote it correctly, W. L. Washington, but does not know how the error happened in Virginia, he only knows that the receipt given him contained the correct name, and when the pawn ticket was brought to him it contained the name "W. Yelp"; is perfectly sure that this name, "W. Yelp," was written, not only his initials, "W. L. W.," is absolutely certain it was "W. Yelp"; takes that to be "Yelp"; it might be read "W. L. W.," his initials, by some.

By REBAR L. TILTON.

On direct examination:

Had a transaction at the office of defendant at 9th and D Sts., Northwest, in the month of February, 1917; there was a dark-haired man in the office, she spoke to him first, he was in behind the cage, right by the left-hand side going in. She had two rings, and said she would like to get a loan on them; he said "We don't give loans at this office, but you can go over to the Virginia office. There is a car leaves in about five minutes;" she waited and took the goods over there by automobile from 9th and D sts.; when she arrived at the Virginia office she got $3 on the rings and left them there; other than the money she got a white slip, a redemption slip, to get the goods with when she returned for them; she returned to Washington by the automobile, leaving it at 9th and D; and paid nothing for the automobile service either way. In the month of April she

went to the office at 9th and D Sts. in Washington and asked for the return of her goods and they told her she would have to go to the Virginia office to get the goods, that they didn't give the goods there, that the car left in a very few minutes and she could wait; she waited a couple minutes and then the automobile went over and she handed them the white slip and asked for the rings; they said "We don't give the rings here, but you pay the money here and then you return to Washington for your property;" she paid the money and then returned in their car over to 9th and D for her rings, paying nothing for the automobile service either way; on her return here she went into the office at 9th and D Sts. and there received her rings; she saw some gentleman with dark hair, simply handed him a slip that showed she had two rings coming to her, and had no words with him, he simply returned her jewelry; he opened the safe and seemed to take it from one of the little drawers and then he removed the rings from a little paper bag, she left with him the certificate which was given her at the Virginia office.

14 On cross-examination:

When she went to Virginia to pay the loan so that she could get her rings back, she was given a paper certifying that she was paying the loan; she in fact got the money in Virginia when she borrowed it and paid it back in Virginia; what she got in Virginia in the first instance when she borrowed the money was a pawn ticket; this she kept until she was ready to pay the loan, and then she went to Virginia with the pawn ticket and paid the money and got a paper reciting that she had paid her loan, and with that paper she came to Washington and presented it as evidence that she had paid her loan and then got her rings back. When she first went about the loan she went into the office at 9th and D Sts. and saw somebody on the left and went in; on one side was the Dime Messenger, and on the other was a man supposed to be in the office of defendant, they were both dark-haired men, one was on the left and one was on the right; the dark-haired man to whom she first spoke was on the left and he told her that she could not get any loan there, told her to wait for the automobile and it would take her over to the other office. She saw the sign, "Dime Messenger," there were half a dozen signs, one about free automobiles leaving, she would not say the Dime Messenger sign was on the left; the Dime Messenger sign was on the right side, on the other side, and this man was on the left, I think as you go in. I know one is on one side and the other is on the other side, and on one of these two sides there was this man and on the other side was this Dime Messenger sign, at a little cage he sits at.

By FRANCIS D. SCOTT.

On direct examination:

Had a transaction with defendant at 9th and D Sts. Northwest. February 1, 1917, when he went there to make a loan; he found

there some gentleman behind the counter on the east side of that office room, 9th and D Sts.; went to the gentleman behind the counter and told him he would like to make a loan; he said that he made no loans there, that witness could go to their Virginia office, and there was a free automobile that ran every fifteen minutes; witness said "I have a pair of cuff buttons, if you would give me an idea what they are worth, I would know whether it was worth while to go to the Virginia office;" he said "We make no valuations here;" witness asked him about what time then the next automobile would go to the Virginia office, and he stated the time, about 4:45, and witness went down there and took the automobile, defendant's automobile, he asked the driver if that was the one that went to the defendant's Virginia office and the driver said it was; it was on the D St. side of the office; witness got in the automobile and went to the south end of the (Highway) Bridge; upon arriving there he went to a frame building there and went to the counter, told the man that he wanted a loan on his cuff buttons, laid down the cuff buttons, and asked if he could get $2 on them, the man said to wait a minute, went
15 back to the rear of the room, returned and said "Yes, I will let you have $2 on them," so witness said "All right," the man asked his name and address and wrote that down on a piece of paper and then gave witness the two dollars and a yellow ticket which was a pledge for the cuff buttons; witness returned in the same automobile to 9th and D Sts., Northwest, making no payment for the service either way. He redeemed his pledges on March 30, 1917; went to defendant's office at 9th and D Sts., and told the gentleman behind the counter he would like to pay his loan and the gentleman said "Well, you will have to take the automobile to our Virginia office," and witness did so, taking about the same route that he had taken the month before, across the Highway Bridge, and arriving there went in and presented his pawn ticket and the money, which the man behind the counter took and in return gave witness a white slip of paper called a redemption certificate, saying that witness would have to go to their Washington office at the corner of 9th and D Sts. to get his cuff buttons; witness got in the automobile, went to the office at 9th and D, presented the redemption certificate to the man behind the counter, on the east side of the room, told him he had a pair of cuff buttons, that the man in the Virginia office told him he could get them there, and so the man took the redemption certificate, looked at the number, turned to the safe and took from there in a little envelope the cuff buttons, and tore it open, and handed them to the witness. On the second visit described from 9th and D Sts. to the south end of the Highway Bridge in the automobile, and the return trip, witness did not pay anything for the automobile service.

On cross-examination:

When he secured this loan he went to the Virginia office, exhibited the cuff buttons and got the loan and a pawn ticket, and when he

wanted to get his cuff buttons back he went to the Virginia office, having been told in Washington that he could not redeem them here, that he would have to redeem them in Virginia, he went to Virginia for that purpose, in the free automobile; after he had paid the loan he got a paper, the only words on it that he remembers were "Redemption Certificate;" he got that paper for the purpose of getting back his articles, that is what the gentleman informed him, that was what it was for, when he presented it at the Washington office, and he took that paper, presenting it at the Washington office and got his cuff buttons back on March 30, 1917.

By CHARLES G. HARTMAN.

On direct examination:

Had a loan once at 9th and D Sts., Northwest, about April 2 or 3, 1917. Went to 9th and D Sts. to ask defendant about the loan; saw a clerk standing back of the counter, they had bars against the counter, and he had his watch and took it out and asked the 16 man for a loan on it, "No, not at this office, you will have to take the regular free automobile service and go to Virginia, and it will leave in about ten minutes or less, or you can use the Dime Messenger Service across there," which was right back there; witness said that he didn't want to go over there not knowing whether he could get what he wanted on his watch and would like to know something about it, but the man said he couldn't tell here but they would tell him at the office over there; and witness took the automobile and rode over there and went in the office and told the fellow that he would like to have $15 on the watch, and he gave witness the $15. This office is just over the Bridge in Virginia at a little place, the office, as near as he can tell, was the one that the clerk at 9th and D Sts. said was their office in Virginia; he does not remember that there was anything there to indicate what office it was. The man there gave him $15 in a little envelope, a little tag or piece of paper to show loan of $15 on a watch and chain; Witness got in the same automobile he had ridden over in and it never stopped until he got to 9th and D Sts. where he got out; did not pay anything for the automobile service either way. About seven or eight days later witness went to defendant's office, he had this white slip of paper and had been told that the watch would be kept at 9th and D pSts., so he went there, 9th and D Sts., and asked the clerk in the office for his watch; the clerk told him that he could not give him the watch, that he would have to go over and pay his money at the office in Virginia and that then he would get an order to come there and get his watch; he went in the automobile over there and paid his money and was told they would give him his watch; he came back in the automobile and got his watch and chain. In return for the payment of the loan he got an order to go to 9th and D Sts. office and get his watch; he went back in the same automobile that he went over in, and did not pay for the service either way. He gave the order to the same man he talked with every time he went

there; the man went right back, opened the safe and brought witness's, so he went there, 9th and D Sts., and asked the clerk in the safe for witness's watch. Witness's name was on the loan paper, the paper that was the receipt for the watch; this was given in Virginia; he thinks defendant's name appeared on the paper but is not positive; there was a piece of reading on the paper, there were names appeared on it, what names he does not know.

On cross-examination:

When he went back to Virginia and paid his loan he got a paper order certifying that he had paid the loan and thereby redeemed the pledge and that the article would be delivered to him upon demand at a certain time without storage; the paper had defendant's name on it, it told him where the watch would be redeemed, at the ware house at 9th and D Sts. in Washington, is positive about this.

By JAMES W. HAMMETT:

He is book-keeper for the Washington Post and produced issues of that paper, eleven in number, of various dates from February 5 17 to April 3, 1917, both inclusive; whereupon it was admitted by counsel for defendant that in each of the said issues there was inserted by defendant's authority the following advertisements:

"Loans

"Horning

"Rhodes, Va. (South end of Highway Bridge)

"Free automobile from 9th and D Sts., N. W."

It was also admitted by counsel for defendant that by the authority of defendant an identically similar advertisement appeared in the Washington Times newspaper, daily, from February 1, to March 13, 1917, and also in the Washington Herald newspaper throughout the period covered by the information, except as to the dates March 5, and March 7, 1917.

By CLIFTON AYERS.

On direct examination:

He is Assistant Advertising Manager of the Washington Herald and produced issues of that paper of March 5, and March 7, 1917, each of which contained the following advertisement, which was paid for by defendant as part of a general bill rendered him by the Washington Herald Company:

"Horning"

The pawnbroker's three balls underneath, Then, on one side of the pendant ball, the lower one:

"Loans"

On the other side, the same word, "Loans." Then below:

"Loans on

"Diamonds, Watches, Jewelry

"Free automobile service from northeast corner of Ninth and D Streets, N. W."

On cross-examination:

He has no personal knowledge how this advertisement got into the Herald. March 5, 1917, was the day following the last inauguration of President Wilson and the issue of that day was a special issue of the Herald, as also was the issue of March 7. In getting out this special issue incident to the inauguration, advertisements for this special edition were solicited from merchants and advertisers in the Herald in general; he could not say how this advertisement
18 was got, a young man by the name of Moran was handling defendant's account at that time; Moran left Washington about October 15, or November 1, last, and has not since returned. This particular advertisement appeared only in those two issues of the Herald, and for the rest the regular advertisement, a standing advertisement, continued right through. Both the standing advertisement and the special advertisement appeared in each of the issues of March 5, and March 7.

By EDWIN L. COCKRELL:

He is the publisher of Cockrell's Transcript, and there appeared therein on various dates between February 1, and July 13, 1917, an advertisement of defendant, which was paid for by defendant in advance; defendant paid in advance by the year which included dates referred to. Witness does not know what particular form of advertisement defendant authorized during the period under consideration; this particular advertisement was handled by Mr. England. The advertisement is as follows:

"Horning's — three balls—

"Loans

Diamonds Watches Jewelry

Free automobile service from northeast corner of 9th and D Streets N. W."

The witness was thereupon asked if the same advertisement did not appear in Cockrell's Transcript from the date of February 1, 1917, to the present time; to which question defendant by his counsel objected upon the ground that anything after July 13, 1917, was irrelevant and immaterial, and upon the further ground that there was no evidence that defendant or anyone representing him ever saw this advertisement in any issue of this paper; which objection was overruled by the Court and defendant by his counsel duly excepted to such action; whereupon the witness answered "Yes."

By CHARLES A. EVANS.

On direct examination:

He is a detective sergeant of the Metropolitan Police Department, has been connected with the Police Department about twenty-five years and with the Detective Bureau sixteen. Has known defendant about twenty years. Being asked if he knew what business defendant was engaged in prior to February 4, 1913, defendant by his counsel objected to the question upon the ground that it was irrelevant and immaterial what defendant's business was at any date before the information, which objection was overruled by the Court and defendant by his counsel excepted to such action; whereupon witness answered "Pawnbroker," and that defendant's place of
19 business as a pawnbroker was the northeast corner of 9th and D Sts. Northwest. Had known that defendant had a place of business between February 1, and July 13, 1917, at the same place, a storehouse, or warehouse as it is termed, at that corner, 9th and D, Northwest. Has visited defendant at that place between February 1, and July 13, 1917, many times; noticed there certain signs; one of them is, "Horning's Collateral Bank;" another, "Warehouse;" another, "Formerly George D. Horning's Loan Office;" another "Free automobile service to my Virginia office;" another, "Dime Messenger Service, Incorporated;" another, "The last automobile leaves for my Virginia office," giving time; and another, "No appraisement of any kind will be made or money loaned in this office other than on pledges prior to February 3, 1913," the last being a large sign, a printed sign, with defendant's name; witness saw also three gilded balls over the door on the outside; of the signs spoken of, five or six were on the outside and two on the inside, some on the 9th St. side and some on the D St. side of the building, and the warehouse sign was painted on the glass of the two doors opening on the corner. The interior of the premises is quite like a bank; there is a counter with a rail around it, a sort of woven wire rail; there are three or four little private booths at one end that used to be used when defendant was a pawnbroker there; there are about seven or eight safes in it, and prior to a couple of weeks ago there was a Dime Messenger Service in the place with a desk and rail. He has seen property taken out of the safes and placed back again after being looked at; has seen people call at the place between February 1, and July 13, 1917, has seen them come up to the counter where the clerk was and pass tickets to the clerk, who would go to the safe and hand

out property, jewelry. Defendant has another office in Virginia, South Washington, Virginia it is called, that is just over the Highway Bridge on Virginia territory. Has many times gone from the local office to the Virginia office, some times in the same automobile with people whom he saw at 9th and D Sts., defendant's automobile; defendant told him that he had three machines just to bring people backwards and forwards to his Virginia office.

On cross-examination:

Defendant's place at 9th and D Sts. is a warehouse, a storehouse, he has a clerk in charge, he has the safes; many times witness would go in to use defendant's telephone, at other times through defendant's courtesy, he has ridden in defendant's machines to Virginia and looked over books there for stolen property, defendant's clerk would give witness the number of the article and very often witness would come to Washington and show it to the clerk here, who would get it out of the safe and let witness look at it, and very often witness would look at the property in Virginia office; they have a safe there, one large one; this experience with defendant in the particular inquired of has been since the business started in Virginia in 1913. The occasion of property located at 9th and D Sts. being taken out and put back, as witness described, was
20 that it was brought out to show him, to see if it was the property he was looking for; he has seen other people go up with a ticket and pass it under the window to the clerk, and has seen tickets there, warehouse tickets calling for the property; the clerk would pass them the property and the people would pass out. The gilded balls have been there since defendant first occupied the building years ago. Being shown photographs, witness described the premises at 9th and D Sts. therefrom. In addition to the safe in the Virginia office, defendant employed a watchman, who lives with his family next door to defendant's office there. Every time witness has had occasion to look at defendant's books he found them in the Virginia office; so far as he knows that is where defendant's books are kept, that is where witness has always seen them. Since the law of 1913 went into effect he has never known of a transaction or of an appraising to be made in defendant's office in Washington; has known of such transaction being attempted in that office with the result that they did not go through, they were refused. Has had occasion on behalf of the Police Department to seek defendant's aid in the matter of appraising property with the result that it was always declined both at 9th and D Sts. and at headquarters, and defendant required that articles be taken to Virginia, where he would appraise them free of cost.

By MORRIS KRESSIN.

On direct examination:

Is secretary of the Dime Messenger Service, and was such between February 1, and July 13, 1917. The executive offices are at 712

12th St., Northwest, and between February 1, and July 13, 1917, it had a branch office at 401 9th St., Northwest, defendant's warehouse; engaged the place occupied by the branch office from defendant and paid him for it. His business there was messenger and delivery service. Between February 1, and July 13, 1917, carried messages from his 9th St. office to the State of Virginia; during that period about seventy-five or one hundred people a day would engage him in connection with the messenger service; transacted delivery service and messages sent into the city and to Virginia back and forth; the messages were sent over to the defendant's place in Virginia; carried the messages as a common carrier, public service. His business transactions covered the taking of property from 9th and D Sts., Northwest, to defendant's establishment in Virginia; people would come in at 9th and D Sts. to place their goods and redeem their goods, pay interest on their goods, and practically redeem them; a representative of defendant would come to witness's desk and say that this person called to pledge this watch; witness having the application blank for the purpose, and the person would make the application and put down the amount of money he wanted, state the article that was sent, and his name and address; witness would send the goods over to Virginia and they would place the appraisement on them and send back the money by the messenger,
21 would either send the money back upon the goods or return the goods; witness's clerk in return would give the money back to the person that made the application for the loan, and also a pawn ticket that came from Virginia. If the person making the loan wanted to redeem the property he would come to the desk and say that he wanted to redeem his property and to send over for it, and would ask witness to figure out the amount of interest, which would be done and the ticket and the name were put in an envelope and witness would give a receipt for it, enter it on his books, and give it to the messenger; the messenger would take the money and ticket to Virginia and get a redemption ticket and bring it back to Washington and give it to the clerk, who would hold it for the party when he came back, and then when the party came for his goods he was given the redemption ticket, and he in turn gave it to defendant's clerk, who would procure it from defendant's storehouse there. Valuables are stored there at the storehouse at times, watches, jewelry and things of that kind, of witness's own knowledge practically everything that was pawned in Virginia was placed in there. From February 1, to July 13, 1917, rates for taking an article into Virginia and returned with the money as stated were fixed by the Messenger Service, which usually was a ten cent rate, and was increased to fifteen cents; used to have a twenty cent rate which was later reduced to ten cents practically by command of defendant, who said that the higher rate would not be fair to his customers. Asked whether the defendant had access to his books, witness replied, "In one particular instance, between February 1 and July 13, 1917, an instance where they charged a man thirty cents for carrying an article worth two hundred dollars, and defendant being told this had been going on all the time said that it would not go on any

more, that he wanted the record of every transaction made, that there would not be any more charges above ten cents, and the rates were reduced to ten cents."

Had a talk recently with defendant at 9th and D Sts.; he informed defendant that he was called to the District Attorney's office to give evidence regarding the case, and a member of defendant's firm told him simply to give no information whatever, simply to tell them he knew nothing regarding it one way or the other. Asked if defendant examined his books recently in connection with the charge on which he was being tried, witness answered that as a matter of fact defendant requested him to give him, defendant, a leaflet out of his books, and as a matter of courtesy witness did so, defendant said he wanted it as evidence in his case; wanted to know whether there would be anything to implicate him in the case, whether there would be any record showing his customers. Witness keeps a record of the customers for his own file, and maintained a receipt which is signed by the customer when receiving the articles from the Messenger Service. Had a conversation with defendant in February, 1918, witness took up the matter of rent, and said it would be necessary to increase his rate considering the revenue he got out of it, said that he felt that they were maintaining the service at a loss; defendant said
22 he was awfully sorry but he would let the rent go; witness had not paid the rent and defendant's clerk in Virginia asked why, and witness said that was understood by defendant and him, and witness went to defendant and asked him about it; defendant denied it at the time but finally said he did not recall whether or not he had the conversation with witness about that and said the rent would have to be paid until after his case was over with, and then he said "We will talk about it later on;" he said the case was coming up and he would have to protect himself fully for the case and therefore the rent would have to be paid.

On cross-examination:

The Dime Messenger Service has been in business since 1908, its main office has been at 717 12th St. Northwest, since 1912, first established a branch office June 5, 1913, at 9th and D Sts., the only branch office it ever had. It is a family corporation composed of his mother, brother and himself; defendant has no interest in it and never had; it does quite an extensive business and had such prior to opening the branch office; paid no rent for the branch office for seven or eight months or possibly a year, but from then until lately paid rent at $5 per month; at first did not do business there to any great extent but eventually got to doing quite a good business there, mostly for those persons who employed them to go over to Virginia, but to some extent for other persons who would come in. At first charged ten cents to take a message from 9th and D Sts. to Virginia, and in March, 1918, raised it to fifteen cents; defendant complained of this and it was the cause of some little friction between the Service Company and defendant; defendant didn't have anything to do with their business but he interfered with its rates and therefore controlled the rates, in

other words, if they had not continued to charge the rate defendant thought his customers ought to pay, he would ask them to leave and put somebody else in their place; the Company was not serving defendant but his customers, and witness thought the matter of rates should be left between the Company and its customers. They had a sign there at that corner, "Dime Messenger Service," on the outside and also one on the inside, and one desk at which generally sat a clerk employed and paid by the Company; witness himself at times sat there, and besides the clerk they had two messengers; the clerk, sometimes witness himself, and sometimes somebody else would give these articles to the messenger to go er and then come back and report. Back of this desk was the sign up on the wall "Dime Messenger Service." When the service received from anyone who came there an article to be pawned, the Service became personally responsible for that article and continued so until the return and delivery of the pawn ticket, and also if one of its messengers went over to get a warehouse certificate, the Company was responsible for that and for its delivery to the man, so that as between the Company and the customer the Dime Messenger Service was responsible to the customer, and during the time covered by the information all of the messengers of the Service were bonded. The process was this: someone
23 would come to that office with a view to making a loan, he would be told that he could not make the loan there, that he could not have his goods appraised and he could not know how much loan could be made, and the Dime Messenger Service would undertake to act as messenger for the applicant and take his application over to Virginia and have it acted on there; defendant had nothing to do with that until it reached Virginia; then when the Service received an article, the man wanting to get money on it was told that he could not make any application, could not have the article appraised there, that he could not be told there how much he could get on it, but that the article had to go to Virginia and had to be delivered to the Virginia office; the application was made at the office of the Messenger Service which, as a Dime Messenger Service, took the application from the customer, and the Service would act as his messenger to make the application over in Virginia; as the agent and representative of the man who wanted to borrow the money, the Service took the article over to Virginia or sent it over by his messenger; the Service would give a receipt to the man who wanted to borrow the money, and at the same time the man would give the Service a written application on a printed form that would be filled out, and the Service or its messenger would take it over with the blank signed by the man—not necessarily signed by him, sometimes the man would ask the Service to make out the application, and the Service would give him the receipt as evidence hat it had his article; the Service was responsible for the articl til it returned the article, or instead of returning it got the money that the man wanted to borrow and the pawn ticket that represented it; then when the Company's messenger would come with a pawn ticket and the money, the man would surrender this receipt to the Company, which, in turn, would give him the money and the pawn ticket; before the Service

would give the man the money with the pawn ticket, he had to surrender the Company's receipt, and also to sign a paper showing that he had received the money from the Company; that concluded the transaction; nobody had anything to do with paying the Messenger Service except the man who was making the loan, and it was in his behalf that the Company's messenger went to Virginia, made application for the loan and negotiated the loan; if upon taking an article over to Virginia the messenger was informed that they would not lend the desired amount on the article, it was brought back and delivered to its owner and the Company would take back its receipt, and in addition protect itself by taking a receipt from the man, showing that the Service had returned the article without any loan; in every case, whether the loan was made or not, the Service exacted this latter receipt as its discharge, because as a common carrier holding itself out to the world, it was responsible to every man who entrusted his stuff with it to have it returned or else returned in the form of a loan and the pawn ticket; that is the relation the Service had to the business down there at their corner while it was there. When it came to a redemption of the article, if the borrower came there to 9th and D Sts., he was told that he could not get the article, he could
24 not redeem it there, but would have to go over and redeem it in Virginia by paying back his loan and interest over there, and the Service took the money that was due, principal and interest, and would go over to Virginia and pay it for the borrower, and in return get this warehouse redemption paper and bring that back to the man and deliver it to him and acquit itself of any responsibility, taking a receipt for the article; so that the relation of the Dime Messenger Service to the transaction began with giving a blue slip as a receipt for the article, going over to Virginia and making the application for the borrower and in his behalf over in Virginia, getting the money and the pawn ticket and bringing it back to him, taking the blue receipt and handing him a white receipt, and there the transaction stopped until the man came to redeem the article, then when he came to redeem it, the same thing was done with reference to his paying the Company the money and interest, itself taking the money over to Virginia and paying it over there on his account for him and on his account, getting the redemption ticket and then returning it to him, and if he chose, he could carry this around in his pocket for thirty days or present it and get his article, just as he pleased, he had the privilege of leaving the article without taking it out after he had redeemed it for thirty days without being charged storage. Referring to the sheet or leaflet given by witness to defendant, it was a blank sheet, leaflet, with nothing at all written on it; defendant said he wanted to take it up with his counsel and see what the leaflet had on it; it was in fact a blank sheet and witness showed it to defendant's counsel who told witness to go — the District Attorney and tell the evidence as it is, and in that connection witness showed counsel the sheet and explained it to him, recognized the sheet as presented by counsel saying that the writing thereon is his handwriting and that he wrote it right under the eyes of defendant's counsel; defendant said that the system would have to be changed, that there was too

much red tape as far as the records were concerned, and after defendant's counsel told witness to go to the District Attorney and tell everything without reservation, witness did so, there is no question about that, and the sheet shown witness is the identical one he used in explaining to defendant's counsel about entries in the Company's book.

The application blank referred to by witness was printed at his Company's expense and was its property; defendant told him to devise it, told him what to write, these forms were printed at the expense of the Dime Messenger Service and used by it in carrying these articles over to be pawned, witness filled in the blanks according to the instructions of the customer, who would tell how much money he wanted, etc. The form is as follows:

25 "Established 1907 Bonded Messengers

Phones Main 5120-5121

"Dime Messenger Service
"(Incorporated)

"717 12th Street Northwest

"Phones: Main 5120 and 5121
"Main 4086

"Branch Office: Corner 9th and D Streets, N. W.

"WASHINGTON, D. C.,.....191

"Mr. George D. Horning,
Highway Bridge,
Virginia.

"DEAR SIR:

"Please send me $.....(Dollars) or as near as possible on enclosed articles ..-.....

"Name .....
"Address .....

"Age.
"Height.
"Color."

Then would follow a description of the article, then the man would sign his name and address or witness would do it for him, and that was delivered by the man to the messenger, who took it over as the thing to show to the office when he got over there; if the transaction was satisfactory, the messenger would come back with the money, and if it was not satisfactory, he would come back with the goods, so that instead of carrying the application over by word of mouth, the messenger carried it on this blank that was filled out in accord-

ance with the instructions of the customer. The Messenger Service has no longer a branch at 9th and D, it was given up about ten days ago: we did not move out over night, we closed our business down Friday and moved the office next morning; didn't say anything to defendant about that until after it was done, moved everything away from there that belonged to the Company, signs and all the Company didn't feel particularly satisfied with regard to the whole transaction, there was friction between the Company and defendant, and one morning without any notice to him the Company just moved out and has stayed out ever since.

On redirect examination:

The blue slip and the white slip were forms of the Dime Messenger Service paid for by it; the printed matter on the application form was dictated by defendant; he directed witness to have
26 those applications made. Referring to additional loans on pledges already with defendant, which people retain tickets for, if a person had got $5 and wanted $3 more, the application made therefor was sent to Virginia, the original application was made to Virginia and when the customer came in he made an application to us and we in turn took the number of the ticket, the number from the pawn ticket and gave it to defendant's clerk, who took the goods out of storage, gave us the goods, we took the goods and the ticket and sent them to Virginia for appraisement, and then they either sent back the money requested or as near as possible to that amount, making an additional loan on the same article: such additional loans were made between February 1 and July 13, 1917.

On recross-examination:

Can't recall any particular ones but knows there were a great number of them, we handled them the same as we did the loans and redemptions, or partial redemptions: the only difference between the original transaction and the additional transaction was that in the original transaction the property was in the actual custody of the borrower and would be delivered by him to witness, and in the case of the additional loans the property had again to be taken over to Virginia to see whether it would bear extra loan; it would be taken over by us only it was sent through us. With reference to preparing the application form, does not recall that he started to prepare a printed form for his convenience in taking over these articles to Virginia, and that Mrs. Horning and Mr. Marks who were there at 9th St. assisted him in revising it; he had in view making the application and he presented that to defendant, who corrected it and gave it back to witness; it may be possible that it was Mrs. Horning and Mr. Marks who changed witness's language so as to have it read this way, but it was given to witness by defendant; witness originally had a form in view; they would not agree to it and witness handed it to them and it came back to him in this form and he had it printed as being his intention as to the manner in which he would carry these over.

And there the District rested.

And thereupon the defendant, to maintain the issues on his part joined, offered and gave evidence tending to show as follows:

By HOWARD H. ENGLAND.

On direct examination:

Was employed by Mr. Cockrell, publisher of the Transcript, April, 1915, until March, 1917; had to do with insertion of the advertisement in the Transcript for defendant; called at defendant's office in Virginia several times to secure advertisement and finally got it; defendant authorized it, that is, he told witness to get a copy of the advertisement from another paper, which he did, and turned it in to the office, to the printer, to put the advertisement in the
27 paper; does not remember the paper he got the copy from, it was one of the papers here in Washington bearing defendant's advertisement, copied that, as he supposed, and turned it in to the Transcript. Did not show it to defendant or anybody connected with him; at the time he turned it over to the Transcript he believed he was turning over an accurate copy of the other advertisement.

On cross-examination:

Defendant told him to copy an advertisement in another papet and insert it in Cockrell's Transcript, and that witness did.

On redirect examination:

Can't say that he did, did not read it until after he put it in the paper; that is he did not compare advertisements; can't say it was an exact copy; thought it was, and passed it into the Transcript and never compared what was in the Transcript to see whether it was in accordance with the other; did not read it.

On recross-examination:

Has no personal knowledge to-day that that was not an accurate copy that he turned in.

By BENJAMIN A. LEATHERMAN.

On direct examination:

Is warehouse clerk at corner of 9th and D for defendant, has been so employed since January, 1915. Does not remember any one of the witnesses Washington, Tilton, Scott or Hartman applying at defendant's office at 9th and D Sts., between February 1, and July 13, 1917, for the purpose of making a loan; during this time does not think there was any other person employed as clerk there besides himself, was relieved at the counter only at vacation time and sickness. What he and anybody else did about the place was simply storing defendant's goods The office, or warehouse, is a large build-

ing, it has eight safes in it, seven of which are used for storage purposes, warehouse purposes only, the other is used for almost anything you might put in there that is not necessary to store for any length of time, we use it for cash sometimes. Informs anyone that comes there that no loans are made in the District, whatever, it is against the law, all loans are made in Virginia; always tells people asking to have articles valued that it is against the law to value articles in the District and furthermore he has no knowledge of the value of articles; respecting inquiries as to how much might be loaned on an article he invariably tells people it is against the law to make any appraisal whatever, and accordingly refuses; people frequently display articles to get a loan on them, but never handles the articles, simply tells them it is against the law for any valuation to be made there, or for any loan to be made there; there follows that they usually ask him how to get to the Virginia office, and he
28 tells them there is a free automobile service, that they can take the street car, sometimes they ask if there is any way to send over; in that case he refers them to a Dime Messenger Service, there are several in the city; at one time when the Dime Messenger Service had desk room in the office he referred them across the room to the Dime Messenger Service, has referred them to the Western Union and the Postal Telegraph; upon being informed by him that no loan and no valuation could be made and no information given of the amount loaned in the District, but that any business of that kind must be transacted in Virginia, the would-be borrowers would ask how they could get to Virginia, and he informs them, they usually take the car or use the Messenger Service at their own discretion, and after any such person had employed a messenger or taken the car and left the office witness had no further relation whatever to him. The articles stored there in the warehouse get out only by warehouse receipt coming from defendant's Virginia office; upon presentation of these warehouse receipts to him he delivers the articles called for and files away the original redemption certificates, they are kept in his possession, he is responsible for them. He does not handle the pawn tickets, has nothing whatever to do with them; the extent of his responsibility is what he has related as to what he does when persons come to the office in the first instance and what he does when they come back with the redemption tickets. During the time he has been employed at defendant's office he has known of no single instance in which an application was received, or a valuation made, or an estimate given of the amount to be borrowed. He has no interest in defendant's business, is simply a salaried employee, has had nothing whatever to do with any advertisements, nothing whatever to do with the automobiles, except to see that they leave the office, and has had nothing whatever to do with the Dime Messenger Service or its messages.

On cross-examination:

Is still in defendant's employ, and was in his employ from February 1, to July 13, 1917. During that period of time persons would

come to defendant's place of business at 9th and D Sts. and say that they desired to secure loans on articles of personal property; then he would say to them that no loans were made in the District of Columbia and that in order to obtain money they would have to go to defendant's office in Virginia; they would occasionally ask him to appraise articles or to tell them whether or not they could expect to get a loan of a certain sum when they got to defendant's Virginia office, and he would tell them that they made no appraisement, and none were made in the District of Columbia, and they could go to defendant's office in Virginia from 9th and D Sts. in one of his automobiles free of charge, and would also say to them that if they desired they could utilize the Dime Messenger Service and send over their pledges if they were about to attempt to secure a loan, or their pawn ticket if they were about to attempt to redeem it, and in a great many instances they would avail themselves of the Dime
29 Messenger Service; when persons so did he would not tell them that if they would come back within a reasonable length of time—an hour or something of that sort—they would get a report or reply, he would simply call in the chauffeur and tell him to make the trip. Couldn't say how frequently these machines left during the period of time inquired of, the cars left sometimes at regular periods and sometimes at irregular periods; we always had two, sometimes three, machines.

When borrowers wanted to redeem their loans many of them came in during the period inquired of, seventy-five or one hundred, probably more or less, a day about the matters he has been talking about. They would come in there and say to him that they wanted to redeem their pledges and he would tell them that could not be done in the District of Columbia, that they would have to go to defendant's Virginia office, he would also tell them that if they wanted to go there in one of defendant's automobiles free of charge, they might do so, that if they wanted to use the Dime Messenger Service it was there at their disposal, and they would pay whatever the charge was, ten cents, he believes; of course they were at liberty to go in any way they pleased, they could walk over there if they wanted; numbers of them would go over in the free automobile service, and numbers of others would utilize the Dime Messenger boys, in either instance if the individual borrower went to defendant's Virginia office he paid off his loan there with the interest and got this paper, redemption certificate, he did not get his article pawned over there in Virginia but got this paper, a warehouse certificate; if he sent over his money and the pawn ticket by the Messenger Service he would get the certificate back by the messenger; then the redemption certificate, obtained either by the person himself or through the messenger and delivered to him, he would bring to witness, who would get from defendant's safe at 9th and D Sts. the article that had been pawned and delivered it to the man who had redeemed it or the man who had presented the certificate, and witness would file the paper. That was the manner of conducting the business during the period we are talking about. During the same time the signs shown by the photographs produced were in existence and in

the places indicated, except the sign. "Former Loan Office, George D. Horning," he couldn't say about that one. Among the people who came there during this period of time some were the same coming in time after time, regular customers. At the time in mind persons who had already secured loans on pledged articles from defendant would desire additional loans on the same pledges and come there to 9th and D Sts. and communicate their wishes in this respect; he would refer them to the Virginia office, the same as in making the original application; if they applied to the Messenger Service, he had no further dealings with the parties at all; the pledges would be sent over by the Dime Messenger Service to defendant or his clerk there: witness gave them to the messengers to be sent to the Virginia office to be appraised there to see whether they could stand the additional loans; lots of people redeemed pledges in that
30 way, requested that the goods be in Virginia to be redeemed; we did not pay the Messenger Service for this. A good bit of the business of communicating to defendant in Virginia the application and paying off of loans and getting the redemption certificates was transacted by this Dime Messenger Service.

On redirect examination:

In the matter of these additional loans, taking one case as illustrative of all, a borrower had made a loan and the pledge was in the vault for safe keeping and he would desire a further loan upon that same pledge, witness would take that article, put it in an envelope, addressing it to defendant or his clerk, and send it to the Virginia office through the automobile or Dime Messenger Service; it never got out of our possession, only with the redemption certificate, so that when he would send this article over he would send it by messenger on account of the office, to be delivered to the defendant or his representative over there, never into the possession of the customer and never into the possession of anybody except for defendant.

By Mrs. GEORGE D. HORNING:

She is the wife of the defendant. Helped to make the paper, the application form, testified to by the witness Kressin. Mr. Kressin prepared a form which he thought was good and asked us if we thought it was all right. She and a Mr. Marks just revised his form.

By HARRY C. COLUMBUS:

On direct examination:

Is chief clerk for defendant and has been for about six years; was employed by defendant when he was conducting business here in Washington and before he went to Virginia; has been employed by him constantly at Virginia; the Virginia office was opened April 21, 1915; it is situated at the south end of the Highway Bridge, known as South Washington, Virginia. It is a one-story frame building, twenty feet wide and about thirty feet long, equipped inside with a counter, four private offices and booths where is grill

work in front of each booth, doors in each booth, and the longer counter at the front of the office has grill work over the top; at the back of the office there is a long desk that has a partition of glass, and behind that partition the bookkeepers work; we work on the other side of the counter behind the grill work. Recognizes photographs produced, and they accurately represent that office. Respecting the manner of conducting the business in the Virginia office, a person coming there for a loan will hand the article to one of the clerks, will ask for a certain amount of money; we will take the article back to the appraising room, look at it, and tell the customer what we think it is worth as a loan, no one makes the appraisement but defendant or witness; if the customer is satisfied with the amount offered, we write him a pawn ticket, describe the article pawned or pledged upon that ticket, give him the money and put the article in the office. Recognizes two pawn tickets shown him
31 for goods pledged at South Washington, Virginia, both of them paid for and canceled; in the one Number 246809, the handwriting is defendant's; the initials, "W. L. W." indicate the man's name; the initials only go on the ticket, that is the uniform practice; this ticket is as follows:

"Address all mail orders South Washington, Va.
"Licensed and bonded under the laws of Virginia.

"No. 246809. $5.00 ——
100

"Office of George D. Horning, Broker.

"South End,
New Highway Bridge,
Phone Connections.

SOUTH WASHINGTON, VA.

Feb. 3, 1917.

"This Certifies, That I have loaned to.....
..... "W. L. W. .....
..... "five ..... Dollars
100
on ..... C. Buttons ....., as a pledge, with interest at three (3) per centum per month or fraction thereof.

"I will not be responsible for loss or damage of any of the goods, articles or things covered by this pledge, by fire, robbery or other casualty, and am not to be held responsible in any way if said goods, articles or things, or any of them, are delivered to the bearer of this ticket.

"If this pledge is not sooner redeemed it will be sold after the expiration of twelve months from the date hereof, or in case of renewal, twelve months from the date to which interest shall be paid.

"GEORGE D. HORNING.

"No Goods Sent C. O. D. Personal Checks not Accepted.

"Office Hours: 8.30 A. M. to 5.30 P. M.

"Ticket Good For One Year From Date.

"90358"

The Number 90358 is the Dime Messenger's Number. What is meant by the statement on the ticket that defendant will not be responsible if the goods are delivered to the bearer of the ticket is that all goods are delivered on the original ticket unless the customer notifies us that the ticket has been lost and we issue a memorandum of that original ticket; that will stop the delivery on the original ticket so that it is up to the borrower to notify us in case his ticket is lost, otherwise we can deliver the goods to anyone who presents the ticket. When a pledge is redeemed we take the ticket and the money from the customer and issue him a redemption cer-
32 tificate, which is redeemable at the warehouse at 9th and D in Washington; "when we deliver this redemption certificate over to the borrower in Virginia, the transaction of the loan and pledge is closed;" the borrower gets the article itself at the warehouse at 9th and D unless he requests it to be sent to Virginia and delivered over there; we have lots of cases where people redeem goods at the Virginia office and ask us to have the goods sen*d* to Virginia, as they are going up the State, or something like that, and are not going back to Washington; we have lots of cases like that, some of them say they don't want to go back to the Washington office, and when the request is made by the customer to have the pledge sent over to Virginia that is uniformly done. Witness has nothing at all to do with the Washington office, only in case of sickness or vacation he has worked there; his custom there has been this exactly: if a customer applied to him while he was there at the Washington office for a loan, he would say, "No loans are made in Washington, but we make loans at our Virginia office," and then the customer would say "Where is the Virginia office?" and he would tell the customer at the south end of the Highway Bridge; customer would ask him how to get over there and he would say "We have free automobile service" that would take him over and bring him back free, that he could go and get a street car at the Mount Vernon Station at 12th and Pennsylvania Avenue, or he could use the Messenger Service; has always told persons asking to have articles valued in Washington that "We cannot make any valuations in Washington as it is against the law;" lots of times that question has been asked him, but he always answered as above. At no time since the new law went into effect has he for defendant at any place in the District of Columbia received an application for a loan, or valued any article, or told any person how much he could get on an article, what he has related is the extent of what he has done every time and in every instance at the Washington office. Respecting the testi-

mony of the witness Kressin that a certain member of defendant's firm told him to give no information to the District Attorney's office, simply to tell them he knew nothing regarding it one way of the other, Kressin came to witness and said "Mr. Harry, I have been called to the District Attorney's office," witness said "Is that so, Morris?" he said "Yes, what will I say to them?" and witness said "Well, Morris, listen; answer any questions they put to you but don't voluntarily tell them anything unless they ask you," and witness told him another thing, said "You better call up Mr. Davis and ask him what to do," he said he would do so; that was all there was to that incident. Respecting defendant's advertising, he advertised in practically all the local papers; witness is familiar with the nature of the advertisement, recognizes the one in the Washington Post of February 5 as the one with which he has been familiar; never at any time knew of any other advertisement than that being inserted for or on account of defendant in any paper. Respecting an advertisement in the Washington Herald of March 5 and March 7, 1917, of a different character from that, it must have been on the third of March that one of the representatives of the Herald called up defendant's office—witness received the message at the Virginia
33 office—and said they were going to run a display advertisement in the paper that would come out on the 5th or 4th of March, in connection with the inauguration; witness said they could do that, to copy the running advertisement that ran in the paper daily, witness supposed they did; has seen the regular advertisement in the Herald, never saw any other than that; did not look at the issues of March 5 and March 7 to see anything about that advertisement, whether it was the same or different; what he authorized was to put the regular advertisement in that paper in display form, did not authorize any change in it, and until today didn't know there had been any change. Defendant is a regular licensed pawnbroker in Virginia and has been ever since he started over there.

On cross-examination:

The rate of interest defendant charged is as shown on the pawn tickets examined here, three per cent a month or fraction thereof. It has occurred at times that there has been an absence in the Washington office and someone would take the place of the absent man, witness did that, sometimes defendant's wife did. When Leatherman first came to work for defendant it was at the Virginia office, and he was sent from there to take charge of the Washington office, he never came to the Virginia office about business matters while in the Washington office; at times defendant came over to the Washington office and at other times he was in the Virginia office; there was telephonic communication between those offices and the telephone was frequently used between the offices in matters of defendant's business, the business witness has been telling about on the stand. Has seen Cockrell's Transcript and defendant's advertisement therein; was acquainted with the advertisement carried in Cockrell's Transcript from February 1 to July 13, 1917.

On redirect examination:

Never noticed advertisement in Cockrell's Transcript close enough to say whether it conformed to the regular advertisement or not, could not tell the wording of it at all; had no idea d endant's advertisement was in there, doesn't believe he ever read it in his life, particularly every line of it; so far as he knew it was not in any sense different from the ordinary advertisement; defendant advertised generally, and so far as witness had any information, advertised always in the same way.

By defendant.

On direct examination:

Is the defendant in this case. Prior to the Act of February 4, 1913, was a licensed pawnbroker in the District of Columbia; opened his place in Virginia April 22 or 23, 1913. He anticipated that this Act would become a law; before it was signed sought the ad-
34 vice of counsel about moving his entire business to Virginia and conducting it under a Virginia license; went to Virginia, bought a lot, contracted for a building and office; about continuing to maintain a warehouse here in Washington was advis that he could do business in Virginia, and when the time came about the pledges that those goods were his own absolutely in bailment, that he had a right to store those goods any place he chose to so long as he was in a position to deliver those goods back to their original owner, regardless of whether it should be Alexandria, Baltimore, Chicago or Washington; selected Washington as his storehouse because he had an office there that is well equipped for taking care of those pledges. Has never made an appraisement, accepted an application, made a loan, or accepted any interest whatsoever under this new Act in the District of Columbia. Is a regular licensed and bonded pawnbroker in Virginia and has been ever since he went there. Makes about eighty per cent of the appraisements, writes probably about twenty-five per cent of the tickets, and probably ten or fifteen per cent of the redemptions on the ticket-. On the ticket Number 246809 what is written in ink is his handwriting; the initials "W. L. W." stand for W. L. Washington; it has been his practice to write on the pawn tickets the initials only of borrowers. Has absolutely nothing to do with the application blank testified to by the witness Kressin. Whenever a pawn was redeemed in Virginia the party would pay the loan and interest and he would issue a warehouse certificate and give it to him and tell him he could receive his goods at the warehouse; in lots of cases people requested their goods to be brought over there; we delivered them in Virginia as well as in Washington. Occasionally goods were kept in the safe over in Virginia, but as a rule he used the warehouse in Washington, stored the goods in his warehouse in Washington because he had better protection there for his money than anywhere else. Until this morning never saw the large advertisement in the Washington Herald and never knew that the advertisement in Cockrell's Transcript was in

any wise different from his general advertisement; remembers the request made of him by the witness England for permission to put that advertisement in Cockrell's Transcript; England came to the Washington office and solicited the advertisement first; the meeting in the Washington office was by accident; witness told England there was no business transacted in Washington and he would have to talk to witness in Virginia; England called him up over the phone to get an appointment to see him at some time in Virginia and he would give witness a special rate if he would pay for a year's contract in advance. Witness accepted the proposition and gave England instructions to copy one of the newspapers and run his advertisement; besides that never had any relation to that advertisement at all.

On cross-examination:

From February 1 to July 13, 1917, was familiar in a way with the operations of the Washington office, knew what that office did in a business way during that period of time; hasn't the faintest
35 idea how many persons a day would visit the office during that time for the purpose of making inquiries about loans. Hasn't any idea how many applications he received in Virginia from the Washington office through the Dime Messenger Service during that period of time, taking loans and redemptions together would say from fifty to seventy-five per day, doesn't know. The first he knew about the application form testified to by the witness Kressin, the latter said he wanted witness to make up an application; witness replied "No, I wouldn't do that, I don't want anything to do with your affairs. My advice is to see your attorney and have your attorney see your papers. I will not have anything to do with it." Kressin did not to his knowledge submit a form to somebody in his office. Kressin handed him that form after, he thinks it was, in this style here; he said, "I haven't anything to do with that. You had better talk with your attorney." Never passed on that form whether it was a good form or a bad form, and only advised him to see his attorney, that is all; doesn't know about Kressin submitting a form prepared by him to defendant's wife and someone else in the office and their changing it in some particulars. Examined his advertisements in some of the newspapers; after placing them in the Washington Herald, Times and Star, he looked at those, the little advertisements; has not seen Cockrell's Transcript in a year and a half, he thinks; Cockrell came to him and asked him about the summons that had been served on him and had his Transcript there, that was the first witness saw of it for eighteen months; has never read that advertisement in Cockrell's Transcript. During the period of time between February 1 and July 13, 1917, if a man had a pawn — with him and wanted to borrow more money on it, that pledge would be sent over from the Washington office to the Virginia office and appraised to find out whether it would stand the increased loan, each case was an individual case; that means this, that if a man had a watch already in pawn and came to the Virginia office today and said he wanted to get an additional loan on it, witness would tell him he would have to wait until he got the goods

and witness would send over to the warehouse for the goods, and say that if they would stand the additional loan he would make it; how the goods would be brought over would depend upon whether the goods were sent by the Dime Messenger Service or came to Virginia direct; the Dime Messenger man being told by the customer that he wanted to get an additional loan, would tell witness's man in the office that he wanted that article to take over to Virginia and would let the messenger have it; this was in accordance with witness's instructions and by his authority; the goods would be taken to Virginia and appraised over there and he would decide whether to make the additional loan or not; the goods were not sent back by the Dime Messenger Service, they were brought back by witness later on.

By HARRY C. COLUMBUS (recalled):

Respecting this additional loan matter on which defendant was just interrogated, if a customer came to the office for an addi-
36 tional loan on an article that was already pledged, he would send the goods to Virginia to be reappraised, they would go over in the custody of the chauffeur if the customer went over in the automobile, otherwise the article was given to the messenger if the request came through the Messenger Service; the goods were addressed to either defendant, if he was there in the office, or witness, they never left witness's possession or defendant's after they reached Virginia until they went back that night by them, "We carried the goods back ourselves," so that the process was that whoever was in the Washington office sent the articles to witness or defendant and then they would deal with the problem over in Virginia, and after they had decided one way or the other, it was they who returned the goods to the Washington office, the goods were never out of their possession at any time.

And there the defendant rested; and the foregoing is the substance of all the evidence offered and given at the trial.

And thereupon the District by its attorney prayed the Court to charge the jury as follows:

I.

"The jurors are instructed that if they find, from the evidence, beyond a reasonable doubt, that the defendant, George D. Horning, between the dates charged in the information, that is to say, between February 1st and July 13th, 1917, not having a license from the District of Columbia as a pawn broker, maintained an office at 9th and D Streets, Northwest, in the District of Columbia, to which office persons applied to secure loans, and exhibited jewelry or other property which they desired to deposit for security of such loans; that they were told at such office, by defendant's employees, that the jewelry or property would not be valued or appraised for loan purposes in the District of Columbia, and that no loans upon the security

thereof would be made in the District, but that they might either send the articles to defendant's office in the State of Virginia by messenger of the Dime Messenger Company, or take them in person to the Virginia office free of charge in one of defendant's passenger automobiles; that when articles were sent by messenger, a receipt for the articles was given by the Messenger Company and the articles were taken to the Virginia office where they were appraised and a pawn ticket and the sum of money loaned delivered to the messenger, who returned to the Washington office and delivered the money and the pawn ticket to the borrower; that when the borrower was transported by defendant's automobile, the money and pawn ticket were delivered to him at the Virginia office, and he was returned by said automobile either to the Washington office or to any other point in the District to which he desired to be taken, and that when the borrower desired to pay the loan, he presented the money and pawn ticket at the Washington office where he was directed either to send them by messenger to the Virginia office or take them himself in one of defendant's said automobiles, and that a warehouse re-
37 ceipt or redemption ticket was given to the messenger to be delivered to the borrower, or to the borrower direct, as the case might be, which receipt was presented by the borrower at the Washington office, where he received his property; and that defendant charged and received for said loan a rate of interest greater than six per centum per annum, then the defendant is guilty as charged in the information.

II.

"The jurors are instructed that if they find from the evidence, beyond a reasonable doubt, that defendant conducted in the District of Columbia any one or more of the acts essential to the complete transaction of the business of loaning money upon security at a greater rate of interest than six per centum per annum then the defendant is guilty of the offense charged in the information.

III.

"The jurors are instructed that they are not at liberty to consider whether or not the business of conducting pawn shops in the District of Columbia is an advantage to the community or whether or not such establishments should be permitted in the District, or the rate of interest they should be allowed to charge and receive. That the Congress of the United States has legislated for the District of Columbia upon this subject, and the jurors must not be influenced in their verdict by any consideration except whether the defendant is, in fact, engaged in the District of Columbia, in the business of loaning money upon which a greater rate of interest than six per centum per annum is charged on any security of any kind, without first obtaining a license so to do.

IV.

"That the District of Columbia is not required to prove that defendant did not have a license to carry on the business in question, but that the burden is upon the defendant to show that he had such license, and, in the absence of proof by him, the jurors must presume that he had no such license."

And the defendant by his attorney prayed the Court to instruct the jury as follows:

I.

"You are instructed that to constitute an application to the defendant for a loan within the meaning of the information, it is not sufficient for the applicant merely to communicate his desire or request in that behalf to the defendant, but it is necessary further for the defendant to entertain the expression of such desire or request with a view to acting favorably upon the same, in accordance with the proposal of the applicant, and that the mere expression of the desire or request of the applicant and the declination of the
38 defendant so to entertain the same would not constitute an application as aforesaid, within the meaning of the information.

II.

"You are instructed that upon receiving from any person a pledge as security for a loan to such person by the defendant, the latter immediately become vested by law with a special property in such pledge as against all the world, including such person himself, until his redemption of the said pledge by repayment of the loan made thereon, and further, that the defendant became to such person an insurer of the safety of the said pledge, and its due return upon repayment of the loan, and accordingly that it was the right of the defendant, during the continuance of the loan and until its repayment, to keep the said pledge, wheresoever and in such depository as in his judgment, proper; and without regard to the locality of such depository."

"III.

"If you find from the evidence that in making use of his Washington premises as a warehouse or place of storage for his pledges given him the defendant so did for the purpose of safely keeping the said pledges for his own protection against their possible loss, and to the end that he might have them for redelivery to his customers on the repayment by them of their loans and for no other purpose, you are instructed that such use of the said premises did not constitute the carrying on by the defendant of the business of a pawnbroker or any essential incident thereto."

"IV.

"If you find from the evidence that in making use of his Washington premises as a warehouse or place of storage for pledges given him the defendant so did for the purpose of safely keeping the said pledges for his own protection against their possible loss, and to the end that he might have them for redelivery to his customers on the repayment by them of their loans, and for no other purpose, you are instructed that such use of the said premises did not constitute the carrying on by the defendant of the business of lending money in the District of Columbia, or any essential incident thereto."

"V.

"You are instructed that upon the whole evidence in the case your verdict should be not guilty."

To the granting of the first of the said instructions prayed by the District defendant by his counsel objected as follows:

"I want now to go on the record as objecting to this instruction, because, first, it assumes that the defendant has an office in the District of Columbia, to which persons applied to secure loans
39 within the meaning of an application for a loan, as has been submitted to the Court in my first request, and by the information itself; and, in the next place, it assumes that each or any one of these recited facts assumed in the instruction is essential to the carrying on of the business by the defendant in the District of Columbia, as charged in this information; and I request the Court, if it contemplates granting this instruction, to caution the jury, by appropriate language, what is meant by an office where persons applied to secure loans as recited in the instruction, and also to qualify the instruction by telling the jury that they must find that some one of these matters done in the District of Columbia was essential to the carrying on of the business of lending money, as charged in the information. Otherwise, your Honor will say that each and every one of these is essential, and that I respectfully submit you cannot do."

And the Court refused to grant each and all of the instructions prayed by defendant and to the Court's ruling in so doing the defendant by his attorney in each instance excepted, and the Court in each instance noted the exception in its minutes.

And thereupon the Court of its own motion and without granting as prayed any of the instructions asked — either the District or the defendant, charged the jury as follows:

"Gentlemen, if you believe from the evidence, to the exclusion of a reasonable doubt, that George D. Horning did, between February 1, and July 13, 1917, without a license to do so, engage in the business of lending money in the District of Columbia on security at a greater rate of interest than 6 per cent, you should find him guilty as charged in the information. Unless you so believe, you should find him not guilty.

"It is conceded, gentlemen, that the rate of interest charged was more than 6 per cent, and it is conceded that he had no license to operate in the District of Columbia, and the only question for you to determine is: did he engage in the business within the District of Columbia?

"There is no contradiction here in the testimony of these witnesses as to the acts and transactions engaged in and had in the management of this business that was conducted, whether it was conducted here or in Virginia.

"As I say, there is no contradiction in the testimony of the witnesses. They testified to a certain course of dealing, and if the testimony of those witnesses is true, gentlemen, and if these acts were done and these transactions had as recited by them, you are instructed, as matter of law, that they constituted an engaging in business in the District of Columbia.

"As to what constitutes an engaging in business, that is not a question for you gentlemen to determine in this case, because you are instructed that if these witnesses told the truth about the matter that was an engaging in business in the District of Columbia, within the meaning of the law.

"So the only question for you to decide is, do you believe the statements of these witnesses to be true, and their statements
40 are uncontradicted. If you believe the statements of these witnesses about it, then your verdict should be one of conviction, and you should find the defendant guilty. If you do not believe their statements about it, of course you are at liberty to acquit the defendant, and should acquit him, if you do not believe their statements.

"What I have said to you in previous cases with respect to a reasonable doubt applies in this case, as in all cases. A reasonable doubt is such a doubt arising upon evidence as would influence a reasonable man as to matters affecting his own personal interest. If you have such a doubt as that as to the guilt of this defendant, you should give him the benefit of the doubt and acquit him.

"In this case, as in all other criminal cases, the defendant is presumed to be innocent until proven guilty beyond a reasonable doubt, and this presumption of innocence accompanies him throughout the trial until removed by such proof of guilt.

"I think that is all I need to say to you in this matter here. The facts have been portrayed here to you by these witnesses. The Court of Appeals has laid down the law in the case; so that the law in the case is not an open question.

"If you believe the testimony of these witnesses who have recited these facts to you here, it is your duty, then, under these instructions, to bring in a verdict of guilty in this case."

Whereupon the defendant by his attorney excepted as follows, and the Court noted the same in its minutes: "I except, if your Honor please, to the instruction as given to the jury, that if they find the facts as recited by your Honor, their verdict should be guilty."

Whereupon on June 26, 1918, at the hour of five o'clock P. M., the jury retired to consider of its verdict.

Thereupon on the following day, June 27, 1918, the jury having been recalled to the court room, the following occurred:

"The Court: The law makes the jury the sole judges of the credibility of witnesses and the weight of the evidence and where there is conflict between the evidence for the Government and the evidence for the accused it is your exclusive province to weigh the evidence and determine where the truth lies, and no court or other person is permitted to intrude into your province and control your judgment in the matter but we have not a case of that kind here. In the case at bar, there is no conflict in the evidence upon any material point. The witnesses for the Government detail a course of dealing by the defendant. The defendant himself and witnesses introduced by him corroborate the witnesses for the Government and show the same course of dealing. The defendant cannot be heard to say that he himself and his witnesses are not telling the truth. Therefore, there is really no issue of fact for you to decide. You are not authorized to capriciously, arbitrarily say that the
41 witnesses for the Government and for the defendant are not telling the truth, and that the course of dealing of the defendant is other than as described by the witnesses.

"The Court of Appeals has decided that such course of dealing is a violation of the law. That decision is binding upon me and upon you alike. It is my duty to be controlled by it. It is your duty under your oaths as jurors to accept as correct and be governed by the exposition of the law which I give you. In a criminal case the Court cannot peremptorily instruct the jury to find the defendant guilty. If the law permitted I would do so in this case.

"In conclusion, I will say to you that a failure by you to bring in a verdict in this case can arise only from a willful and flagrant disregard of the evidence and the law as I have given it to you, and a violation of your obligation as jurors.

"Mr. Davis: I except, if your Honor please, to this as amounting to a peremptory instruction to the jury to render a verdict, and give notice that on that ground I shall take the usual course as prescribed by the statute.

"The Court: Of course, gentlemen of the jury, I cannot tell you, in so many words, to find the defendant guilty, but what I say amounts to that. The facts proved before you are in accord with the information. The Court of Appeals has said that that constitutes a violation of the law; and that is all there is in the case.

"Mr. Davis: If your Honor please, I repeat my objection and exception, and feel it my duty to say to your Honor that this very question has once been decided by the Court of Appeals of the District of Columbia. The case of Masters, I think, is the name of that case. The decision in that case amounts to saying that what your Honor has said is an invasion of the province of the jury, and on that ground I except and again give notice of my purpose.

"The Court: As I have told you, gentlemen, even if I am in error, it is your duty to accept the law as I have given it to you.

"Mr. Davis: I again except, if your Honor please, on the ground that the only effect of this can be coercion of the jury, and I give them this notice.

"The Court: Retire, gentlemen.

"(The jury again retired to consider of its verdict.)

"Mr. Davis: If the Court please, I now desire to make a motion.

"The Court: You may state your motion.

"Mr. Davis: The jury having been returned by the Court to the court room——

"The Court: The jury room.

"Mr. Davis: Thank you. (Continuing:) —to the jury room for further deliberation, following the proceedings just had, counsel for the defendant requests that it be recalled to the court room for the purpose of the motion now to be made.

"I move the Court to discharge this jury from further consideration of this case upon the ground indicated and stated in the exceptions just taken, and that the jury be recalled in order that this motion may be made in its hearing.

42 "The Court: The motion will be overruled.

"Mr. Davis: And I note an exception and give notice as aforesaid of my intention to apply to the Court of Appeals for a writ of error according to the form of the statute in such case made and provided.

"The Bailiff: One moment, Mr. Davis. The jury is ready.

"(The jury here reentered the court room and returned a verdict of guilty.)

"Mr. Davis: I request that the jury be polled.

"The Clerk: All who are in favor of the verdict of guilty say 'aye'.

"Mr. Davis: Pardon me. I asked that each juror's name be called and be asked if his verdict is guilty.

"(In accordance with the above request, the jurors were individually interrogated as to whether their verdict was guilty, and each of the twelve answered in the affirmative.)

"The Court: You are discharged, gentlemen, from further consideration of this case.

"Mr. Davis: I will make a motion, if your Honor please, in due form, in accordance with the rules, for a new trial, and I ask that the accused be excused until further order of the Court.

"The Court: Very well. That may be done.

All the foregoing proceedings were had and exceptions taken and noted before the jury retired to consider of its verdict, and upon and at the time of the taking by defendant of each of the said exceptions and the ruling of the Court in each instance, notice was given by the defendant, by his attorney, of his intention on account thereof to apply for a writ of error to the Court of Appeals of the District of Columbia, in accordance with the statute and rule of Court in that

behalf made and provided. And the defendant prays the Court to sign this, his bill of exceptions, to have the same force and effect as to each of the said exceptions as though each were set forth in a separate bill of exceptions, which is granted; and the Court accordingly signs this, the defendant's bill of exceptions, to have the force and effect aforesaid, now and then, this 28th day of September, A. D. 1918.

ROBERT HARDISON, *Judge.*

In the Police Court of the District of Columbia.

DISTRICT OF COLUMBIA

vs.

GEORGE D. HORNING.

Washington, D. C., Monday, August 19, 1918—

1 o'clock P. M.

The Court met pursuant to notice.

Present on behalf of the District of Columbia, Mr. Ringgold Hart and Mr. P. H. Marshall.

Present on behalf of the defendant, Mr. Henry E. Davis.

43 The Court (Judge HARDISON): Gentlemen, I have just finished reading the record in the Horning case and I am now ready to give you my conclusions in the matter. This case has given me a great deal of trouble. I have never decided a case with which I had more trouble than I have had with this one. I do not think I have ever practiced a case in which I have had more trouble to satisfy my own mind as to what ought to be done than I have had in this case.

A careful reading of the testimony taken on the trial shows conclusively that there is no conflict in the testimony of the witnesses for the Government and for the defendant upon any essential proposition. The testimony of the defendant even more fully than the testimony of the Government shows the same course of dealing as outlined in the testimony of the Government witnesses because, of course, the defendant has more intimate knowledge of what actually happened and of the way he conducted his business than had the witnesses of the Government. And so it comes down to a question of what the Court has power to do and should do in a case of that sort.

I have read with a great deal of interest the case that Mr. Davis cited to me, the case decided by our Court of Appeals here, I think the name being the Masters case. That case, is the nearest one to this case that I have been able to find. But that case is not this case. My search failed to show that the exact question presented in this case has ever been decided. Of course the books are full

of cases in which the question was just what the judge might with propriety say to a jury where there was an issue for a jury to try.

The judge has to be very careful as to what he may say to a jury where there is an issue of fact. He has to be very, very careful and the courts have gone to great length to guard the rights of people accused of crime. They have said to a judge that he has to keep his hands off when it comes to intruding into the domain of the jury in passing upon an issue of fact.

When you read the Masters case you will see that they reversed the conviction in that case upon the ground that there was some evidence which raised an issue of fact. The question came up in that case as to the admissibility of evidence as to the intent with which the defendant acted. The Appellate Court decided that the trial court erred in not admitting that testimony. In that state of the case, for the purpose of the opinion, the record stood as if that testimony had been admitted, and with that testimony in there certainly was evidence there as to whether or not the man had committed an offense. That opinion, and the language used in it, is based upon that fact. When you read any case the only safe rule of interpretation is to read it in the light of the question that was involved. You have to read and interpret the language in the light of the facts that are involved in that case and the issue presented for decision.

There is a very interesting old case here, a Supreme Court case, that I take it you gentlemen have seen, and that is the case of Sparf and Hansen versus the United States, decided in 189-, 156 U. S., p. 51. In that case two men were charged with murder com-
44 mitted on the high seas. They were brought into the jurisdiction of the United States District Court in Massachusetts and were tried there. They were convicted and sentenced to death. They took an appeal and the main error relied upon was that the trial judge failed to charge the jury with reference to manslaughter. He charged them upon the trial that these men were guilty, on the facts in the case, of murder or nothing, and that the jury did not have the right to find them guilty of manslaughter. There is a Federal statute which provides that "In all criminal cases the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or the defendant may be found guilty of an attempt to commit the offense so charged, provided that such attempt be itself a separate offense."

The defendants contended that it was the duty of the trial judge to give them the benefit of that statute and charge the jury, if they thought they were guilty of manslaughter, that they could find a verdict of manslaughter and not one of murder. Of course that is a very vital thing to a man charged with a *domicide* and it amounts to much more to him than any right that was involved in a case of this sort here. The difference there was between a death sentence and a short term of imprisonment. That case went to the Supreme Court and was very fully presented there. The opinion of the Court was by Mr. Justice Harlan, and the Court held that where the evidence raised no issue as to manslaughter that no right of the

defendants was prejudiced by the Court taking that issue away from the jury and telling the jury that they could not find the defendants guilty of manslaughter but that they should be found guilty of murder or nothing. Two or three dissenting opinions were written in that case and they go back into antiquity, and review the question that is involved in this case to a certain extent, that is, trial by jury, the origin of trial by jury and just what a judge may do and what he may not do in charging. They give the causes for the law and [illegible] it originated. That case is as near to this case as any case I have been able to find (other than the Masters case) although it is not this case by a good deal.

Now I have heard the rule expressed that with us the Court is the judge of the law and the jury are the judges of the facts. That is not quite accurate because as a matter of fact in both civil and criminal [illegible] the court is the judge of whether or not there are any facts. If there are any facts then it is the duty of the jury to take those facts, resolve them and decide any issue that may arise. But it is a question of law always whether or not there is any evidence to be submitted to a jury, a question of law just as much in a criminal case as in a civil case—whether there is any evidence for a jury to act upon, and of course that, like other questions of law, is reviewable by an appellate court. If the trial court errs in saying that there are no facts to go to a jury when in fact there is a question of fact that should go to the jury, that error is reviewable by an appellate court and can be corrected, just as the Appellate Court can review and correct other errors.

45 It is laid down in this case that I have referred to that the Court cannot peremptorily instruct a jury to find a defendant guilty, but when we consider this case and the other cases which I have read, it looks to me that about what the law forbids a judge to do is to peremptorily direct a verdict of conviction, and that is about all as the way of charging a jury he is absolutely forbidden to do when the evidence raises no word of fact. Now the question comes up: is there any other limitation upon his power in charging a jury in a criminal case if there is in fact no issue for a jury to determine? Of course if there is an issue, if there is any evidence to support a plea of not guilty, be it but slight evidence, the Court has got to say nothing that will tend to coerce or improperly influence a jury; but if there is in fact no evidence raising an issue, what prejudicial error is there in anything he may say so long as he gives the jury to understand that he is not compelling them to return a verdict of guilty, and that such a verdict is optional with them. What harm is done if the Court is right in assuming that there is no evidence? If he is wrong in that assumption of course that is an error of law which can be corrected by a reviewing court. But if he is right in assuming that there is no evidence, what rule of law is there forbidding him to say anything that he may say—although it would be highly improper if there was evidence—just so he stops short of compelling a jury by a peremptory instruction to bring in a verdict of guilty. That the law says he cannot do. I have never found any case, although I have searched with diligence, that has decided the exact question here. I have never found a case

that has reversed a conviction for an improper remark made by a judge where there was no evidence to sustain the defense. That is the case we have here, according to my view of it. It is a unique case. I have never been able to find any like it, if I am right in assuming that there is no evidence here to support the defense. In the Masters case, reading into the record made in the trial court the evidence that the Court of Appeals said ought to be in, there was an issue for the jury to try and of course it was improper for the trial judge to say anything relative to the proof that might be construed as coercion or as compelling them to return a verdict that otherwise they might not have returned. If there is no evidence at all it strikes me that if the Court stops short of peremptorily saying to the jury that they must find a defendant guilty, he has not committed an error, and if it is an error it seems to me that at most it is a harmless error of which the defendant cannot complain. I appreciate the delicacy of the question presented here, because the right of trial by jury is one of the treasures of the Anglo-Saxon race; it is a thing we lay greater store by than almost any other right and the law guards it very zealously, but nevertheless it is the duty of the judge to say whether there are facts forming an issue for a jury to decide. It is his duty to decide that question in a criminal case, just as in a civil case, because it is his duty, where there is no evidence to convict, to direct a verdict of acquittal.

While I am not certain about this, and while I dislike to be put in an attitude of doing anything that may be considered
46 arbitrary, and while I think it would be much better for some superior court to announce the rule that I have announced than for a police court to do so, I am obligated to act upon it according to my conscience, and if I am right in assuming there is no evidence here to sustain the defense and a careful reading of that record confirms me in that opinion, it being my duty to see the law enforced it seems to me that my obligation to charge the law required me to say just about what I did say to the jury. It would perhaps have been better if I had said it when I first charged the jury instead of waiting until they had stayed out as long as they did.

That is the best I can get out of the case. I would much rather not have been placed in the position to have to hold this way, but that is my honest conviction about it and it affords you the best possible case to test this very important question. I very much hope, and I suppose you will, take this question to the Court of Appeals and try it out. I think a decision should be had on this vital point where the question is fairly and squarely presented to the Court.

Therefore, gentlemen, I let this motion for a new trial be overruled.

Mr. Davis: I desire to formally note an exception to the action of the Court.

It is ordered by the Court that this opinion be filed and made part of the record in this case.

ROBERT HARDISON,
Judge of Police Court, D. C.

September 28, 1918.—Defendant sentenced to pay a fine of $50.00.

In the Police Court of the District of Columbia.

No. 523,537.

DISTRICT OF COLUMBIA

vs.

GEORGE D. HORNING.

Assignments of Error.

The Court erred as follows.

1. In refusing to grant defendant's prayer No. I for instruction to the jury.
2. In refusing to grant defendant's prayer No. II for instruction to the jury.
3. In refusing to grant defendant's prayer No. III for instruction to this jury.
4. In refusing to grant defendant's prayer No. IV for instruction to the jury.

47 5. In refusing to grant defendant's prayer No. V for instruction to the jury.

6. In instructing the jury as in and by the Court's charge given of its own motion appears.
7. In instructing the jury that the only question for it to decide was whether it believed the statements of the witnesses to be true and that such statements were uncontradicted.
8. In instructing the jury that there was no issue of fact for it to decide in the case.
9. In instructing the jury that, if the law so permitted, the Court would peremptorily instruct the jury to find defendant guilty.
10. In charging the jury that a failure by it to bring in a verdict in the case could arise only from a willful and flagrant disregard of the evidence and the law as given it by the Court and a violation of its obligation as jurors.
11. In peremptorily, in effect, directing the jury to find a verdict of guilty.
12. In over-ruling defendant's motion to discharge the jury from further consideration of the case, upon the ground indicated and stated in the exceptions taken by defendant and appearing in and by the bill of exceptions.

Respectfully submitted,

HENRY E. DAVIS,
Attorney for Defendant.

In the Police Court of the District of Columbia.

No. 523,537.

DISTRICT OF COLUMBIA

vs.

GEORGE D. HORNING.

To the Clerk:

The defendant designates the following to constitute the record on the writ of error allowed him in the above-entitled cause.

1. The information.
2. Plea of not guilty.
3. Verdict.
4. Defendant's bill of exceptions.
5. Opinion of Court over-ruling motion for new trial.
6. Judgment of sentence.
7. Assignments of error.
8. This designation.

HENRY E. DAVIS,
Attorney for Defendant.

48 In the Police Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Cam Howard, Deputy and Acting Clerk of the Police Court of the District of Columbia, do hereby certify that the foregoing pages, numbered from 1 to 74 inclusive, to be true copies of originals in cause No. 523,527 wherein the District of Columbia is plaintiff and George D. Horning defendant as the same remain upon the files and records of said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, the City of Washington, in said District, this 7th day of October, A. D. 1918.

[Seal of Police Court of the District of Columbia.]

CAM HOWARD.
Deputy and Acting Clerk Police Court, Dist. of Columbia.

[Endorsed:] District of Columbia Police Court. No. 3213. George D. Horning, Plaintiff in Error, vs. District of Columbia. Court of Appeals, District of Columbia. Filed Oct. 8, 1918. Henry W. Hodges, clerk.

49 Tuesday, December 3rd, A. D. 1918.

* * * * * * *

No. 3213.

GEORGE D. HORNING, Plaintiff in Error,

vs.

DISTRICT OF COLUMBIA.

The argument in the above entitled cause was commenced by Mr. Henry E. Davis, attorney for the Plaintiff in Error, and was continued by Mr. P. H. Marshall, attorney for the Defendant in Error, and was concluded by Mr. Henry E. Davis, attorney for the Plaintiff in Error.

50 In the Court of Appeals of the District of Columbia.

No. 3213.

GEORGE D. HORNING, Plaintiff in Error,

vs.

DISTRICT OF COLUMBIA.

Opinion.

Mr. Justice VAN ORSDEL delivered the opinion of the Court:

This case is here in error to the Police Court of the District of Columbia. Plaintiff in error, defendant below, was convicted of the crime of doing business as a pawnbroker in violation of the act of Congress of February 4, 1913 (37 Stats. L., 657).

This is the second time this case has been before us. The former consideration arose from an order quashing the complaint on the ground that it did not state a cause of action. 47 App. D. C., 413. The complaint was there held sufficient, and the case was remanded for trial. The complaint contained a complete statement of the facts relied upon by the District as constituting the offence. On trial, defendant and his witnesses testified to the commission of all of the acts charged, which had been held by this court to amount to a violation of the law. Defendant, by his testimony, admitted the facts as completely as he could have done by a plea of guilty.

The single assignment of error worthy of consideration relates to the instructions to the jury. The court, after charging as to presumption of innocence, reasonable doubt and the elements entering into the offence, said: "There is no contradiction in the testimony of the witnesses. They testified to a certain course of dealing, and if the testimony of those witnesses is true, gentlemen, and if these acts

were done and these transactions had as recited by them, you are instructed, as matter of law, that they constituted an engaging in business in the District of Columbia, within the meaning of the law.

So the only question for you to decide is, do you believe the
51 statements of these witnesses to be true, and their statements are uncontradicted. If you believe the statements of these witnesses about it, then your verdict should be one of conviction, and you should find the defendant guilty. If you do not believe their statements about it, of course you are at liberty to acquit the defendant, and should acquit him, if you do not believe their statements. * * * If you believe the testimony of these witnesses who have recited these facts to you here, it is your duty, then, under these instructions, to bring in a verdict of guilty in this case."

After the jury had deliberated for several hours, they were recalled to the court room, and the court further charged them as follows: "The law makes the jury the sole judges of the credibility of witnesses and the weight of the evidence and where there is conflict between the evidence for the Government and the evidence for the accused it is your exclusive province to weigh the evidence and determine where the truth lies, and no court or other person is permitted to intrude into your province and control your judgment in the matter but we have not a case of that kind here. In the case at bar, there is no conflict in the evidence upon any material point. The witnesses for the Government detail a course of dealing by the defendant. The defendant himself and witnesses introduced by him corroborate the witnesses for the Government and show the same course of dealing. The defendant cannot be heard to say that he himself and his witnesses are not telling the truth. Therefore, there is really no issue of fact for you to decide. You are not authorized to capriciously, arbitrarily say that the witnesses for the Government and for the defendant are not telling the truth, and that the course of dealing of the defendant is other than as described by the witnesses. The Court of Appeals has decided that such course of dealing is a violation of the law. That decision is binding upon me and upon you alike. It is my duty to be controlled by it. It is your duty under your oaths as jurors to accept as correct and be governed by the exposition of the law which I give you. In a criminal case the court cannot peremptorily instruct the jury to find the
52 defendant guilty. If the law permitted I would do so in this case. In conclusion, I will say to you that a failure by you to bring in a verdict in this case can arise only from a willful and flagrant disregard of the evidence and the law as I have given it to you, and a violation of your obligation as jurors."

Upon an exception by counsel for defendant to the charge as given, the court further stated: "Of course, gentlemen of the jury, I cannot tell you, in so many words, to find defendant guilty, but what I say amounts to that. The facts proved before you are in accord with the information. The Court of Appeals has said that that constitutes a violation of the law; and that is all there is in the case."

The charge was excepted to by counsel for defendant as amount-

ing to a peremptory instruction to find defendant guilty. In the Federal courts, in both civil and criminal cases, the trial judge may express his opinion in respect of the testimony, and it will not be error so long as he cautions the jury not to feel obliged to be bound by or to follow his suggestions. In Simmons vs. United States, 142 U. S., 148, 155, the court, considering the limitations upon a trial judge in expressing his opinion of the evidence to the jury, said: "The only other exception argued is to the statement made by the judge to the second jury, in denying their request to be discharged without having agreed upon a verdict, that he regarded the testimony as convincing. But at the outset of his charge he told them, in so many words, that the facts were to be decided by the jury, and not by the court. And it is so well settled, by a long series of decisions of this court, that the judge presiding at a trial, civil or criminal, in any court of the United States, is authorized, whenever he thinks it will assist the jury in arriving at a just conclusion, to express to them his opinion upon the questions of fact which he submits to their determination, that it is only necessary to refer to two or three recent cases in which the judge's opinion on matters of fact was quite as plainly and strongly expressed to the jury as in the case at bar. Vicksburg etc. Railroad vs. Putnam, 118 U. S.,
53 545; United States vs. Philadelphia & Reading Railroad, 123 U. S., 113; Lovejoy vs. United States, 128 U. S., 171."

In the present case the trial justice made it clear that the jurors are the sole judges of fact; that he had no power to peremptorily instruct a verdict of guilty, and that, notwithstanding any opinion he might express, the ultimate decision of guilt or innocence resided in the jury. But the foregoing charge must be read in the light of the case before us. It would hardly be contended that the charge could be upheld in a case where there was a material issue of fact for the jury to pass upon, or in the present case had defendant elected to refuse to testify, as was his right, and rely upon the presumption which the law would thereby raise for his protection. But he waived even this right and unqualifiedly admitted every charge made against him, apparently relying upon the dereliction of the jury for relief. It is in this particular that the case of Masters vs. United States, 42 App. D. C., 350, relied upon chiefly by counsel for defendant, differs from the present case. We held in that case that error was committed in refusing to admit certain testimony, which, if admitted, would have presented a sharp issue of fact for the jury. Here, it is conceded there is no issue of fact, and the present decision, it must be remembered, rests solely upon that unique situation.

How far may a defendant rely upon the exercise of arbitrary power by a jury and complain if the jury disappoints his expectations? Defendant's guilt was admitted. There was no fact left in dispute. The duty of the jury was to find him guilty. They had the arbitrary power, but not the right, to return a verdict of not guilty. In Sparf and Hansen vs. United States, 156 U. S., 51, the defendants were charged with the crime of murder in the first degree. The court instructed the jury that there was nothing in the evidence to reduce the crime, if one was committed, below the grade

of murder. This was assigned as error, on the ground that the court had invaded the province of the jury. Section 1035,
54 Revised Statutes of the United States, among other things, provides that "in all criminal cases the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged: Provided, That such attempt be itself a separate offense." Commenting upon the charge in view of this provision of the statute, the court said: "The court below assumed, and correctly, that section 1035 of the Revised Statutes did not authorize a jury in a criminal case to find the defendant guilty of a less offense than the one charged, unless the evidence justified them in so doing. Congress did not intend to invest juries in criminal cases with power arbitrarily to disregard the evidence and the principles of law applicable to the case on trial. The only object of that section was to enable the jury, in case the defendant was not shown to be guilty of the particular crime charged, and if the evidence permitted them to do so, to find him guilty of a lesser offense necessarily included in the one charged, or of the offense of attempting to commit the one charged. Upon a careful scrutiny of the evidence, we cannot find any ground whatever upon which the jury could properly have reached the conclusion that the defendant Hansen was only guilty of an offense included in the one charged, or of a mere attempt to commit the offense charged. A verdict of guilty of an offense less than the one charged would have been in flagrant disregard of all the proof, and in violation by the jury of their obligation to render a true verdict. There was an entire absence of evidence upon which to rest a verdict of guilty of manslaughter or of simple assault. A verdict of that kind would have been the exercise by the jury of the power to commute the punishment for an offense actually committed, and thus impose a punishment different from that prescribed by law."

There was no lawful power vested in the jury to acquit defendant. In convicting him, no right of his was violated, since he had no right to an acquittal. The right of trial by jury guaranteed
55 by the Constitution is the right to a lawful trial where the jury is governed in its deliberations by the law as given by the court. Every general verdict is compounded both of law and fact—the law as given by the court, and the facts as adduced from the witness stand. The jury has the physical power to disregard both, but not the moral right. In the absence of any issue of fact, as here, only a question of law remains; and while the jury has the arbitrary power to disregard it, one failing to profit by such a disregard of duty is not in position to complain. "Every person accused as a criminal has a right to be tried aaccording to the law of the land, the fixed law of the land; and not by the law as a jury may understand it, or choose, from wanton-ess, or ignorance or accidental mistake, to interpret it." United States vs. Battiste, 2 Sumn., 240.

The right guaranteed the citizen is to be tried according to the fixed law of the land, and not according to the mere guess of a

jury in the exercise of purely arbitrary power. If denied the former, he has suffered an injury from which the law will grant relief: if granted the latter, he is the recipient of a gross miscarriage of justice; but, if denied it, he has been deprived of no legal or constitutional right of which he may be heard to complain.

The court in charging the jury that a failure to return a verdict of guilty could be due only to "a willful and flagrant disregard of the evidence and the law * * *, and a violation of their obligation as jurors," stated the truth, and at the same time the law of this case. It is clear that, unless the jury violated their obligations as pointed out by the court, they could not acquit the defendant. The jury, however, was not divested of the freedom to exercise arbitrary power. On the contrary, it was expressly told that it possessed that power. Hence, in order that we may reverse the case, it must appear not only that the jury was not permitted to exercise arbitrary power and "disregard the evidence and the principles of law applicable to the case," or that some other right of defendant has been infringed. The record fails to disclose
56 either. It is not apparent, therefore, that any error prejudicial to defendant was committed.

The judgment is affirmed with costs.

Affirmed.

57 Monday, March 3rd, A. D. 1919.

* * * * * * *

No. 3213, January Term, 1919.

GEORGE D. HORNING, Plaintiff in Error,

vs.

DISTRICT OF COLUMBIA.

In error to the Police Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Police Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Police Court in this cause be and the same is hereby affirmed with costs.

Per MR. JUSTICE VAN ORSDEL.

March 3, 1919.

58 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 57, inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals, in the case of George D. Horning, Plaintiff in Error, vs. Dis-

trict of Columbia, No. 3213, January term, 1919, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals at the City of Washington, this 6th day of March, A. D. 1919.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals
of the District of Columbia.

59 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the District of Columbia, Greeting:

Being informed that there is now pending before you a suit in which George D. Horning is plaintiff in error, and District of Columbia is defendant in error, No. 3213, which suit was removed into the said Court of Appeals by virtue of a writ of error to the Police Court of the District of Columbia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Court of Appeals and removed into the Supreme Court of the United States, do hereby command
60 you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the seventeenth day of April, in the year of our Lord one thousand nine hundred and nineteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 27,010. Supreme Court of the United States. No. 924, October Term, 1918. George D. Horning vs. District of Columbia. Writ of Certiorari. Court of Appeals, District of Columbia. Filed Apr. 24, 1919. Henry W. Hodges, Clerk.

61 In the Court of Appeals of the District of Columbia.

No. 3213.

GEORGE D. HORNING, Plaintiff in Error,

vs.

DISTRICT OF COLUMBIA, Defendant in Error.

It is hereby stipulated by and between the above-named parties, plaintiff and defendant in error, that the certified transcript of record in the above-entitled cause, accompanying the petition of the plaintiff in error to the Supreme Court of the United States for the writ of certiorari in the said cause, shall and may be taken as and for a return to the said writ granted and issued by the said Supreme Court of the United States on the 17th day of April, A. D. 1919.

HENRY E. DAVIS,
Attorney for Plaintiff in Error.
CONRAD H. SYME,
P. H. MARSHALL,
Attorneys for Defendant in Error.

(Endorsed:) No. 3213. George D. Horning, Plaintiff in Error, vs. District of Columbia. Stipulation as to return to writ of certiorari. Court of Appeals, District of Columbia. Filed Apr. 24, 1919. Henry W. Hodges, Clerk.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify, in obedience to the writ of certiorari hereto attached and returned herewith, the foregoing to be a true and correct copy of the stipulation of counsel filed in said cause on the 24th day of April, A. D. 1919.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court at the City of Washington, District of Columbia, this 24th day of April, A. D. 1919.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES, *Clerk.*

62 [Endorsed:] File No. 27,010. Supreme Court U. S., October Term, 1918. Term No. 924. George D. Horning, Petitioner, vs. District of Columbia. Writ of certiorari and return. Filed April 24, 1919.

No. 9[illegible]3 [illegible]7

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. _____.

GEORGE D. HORNING, Petitioner,

vs.

THE DISTRICT OF COLUMBIA, Respondent.

Petition for Writ of Certiorari and Brief in Support Thereof.

HENRY E. DAVIS,
Attorney for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. _____.

GEORGE D. HORNING, Petitioner,

vs.

THE DISTRICT OF COLUMBIA, Respondent.

The petitioner states as follows:

1. On, to-wit, the 13th day of July, 1917, there was filed in the Police Court of the District of Columbia by respondent an information charging petitioner with violation of the Act of Congress of February 4, 1913 (37 Stat. at L. 657, chap. 26), entitled "An Act to Regulate the business of loaning money on security of any kind by persons, firms, and corporations other than National banks, licensed bankers, trust companies, savings banks, building and loan associations and real estate brokers in the District of Columbia," upon the filing of which, and before petitioner's arraignment thereon, the judge presiding, of his own motion, quashed the information, upon the ground that the facts therein set forth did not constitute a violation of the said Act of Congress. On writ of error from

the Court of Appeals of the District of Columbia to the Police Court the Court of Appeals reversed the action of the judge of the Police Court and remanded the cause thereto, with instructions to vacate the order quashing the information, and for further proceedings (*D. C.* vs. *Horning,* 47 App. D. C., 413).

2. Thereafter petitioner being arraigned pleaded not guilty and was tried by the Police Court and a jury, which latter returned a verdict of guilty, and petitioner was sentenced accordingly.

3. On the trial of petitioner by the Police Court the judge presiding, in effect, told the jury that he, the judge presiding, found the facts disclosed by the evidence to be such as the Court of Appeals in reversing the former action of the Police Court had held to constitute a violation of the said Act, concluding his instruction to the jury with what was admitted in substance and effect to be a peremptory instruction to the jury to find petitioner guilty, and an admonition, not to say adjuration, to the jurors that their failure so to find could arise only from a willful and flagrant disregard of their oaths.

4. On writ of error to the Police Court allowed petitioner to review the last mentioned action of that Court, the Court of Appeals affirmed the same, and the mandate of the Court of Appeals to the Police Court to carry into execution the sentence of petitioner is about to issue.

5. Petitioner files herewith as an exhibit a certified copy of the entire transcript of record of the case, including the proceedings in the Court of Appeals.

6. The instructions of the judge of the Police Court to the jury, as aforesaid, amount in both law and fact to a peremptory direction to find petitioner guilty as

charged, upon the ground that the judge himself found as a matter of fact that the matters alleged in the information as constituting the offence charged against petitioner were established by the testimony presented at the trial, and that for the jury to find otherwise would be in willful and flagrant disregard of their oaths, whereby petitioner was deprived of his Constitutional right to be tried by the jury, and not by the Court, in the premises, and the force and effect of such, the action of the said judge, was to coerce the jury to find petitioner guilty, and the jury so found; and the Court of Appeals in affirming the action of the said judge in the premises denied the petitioner his right to trial by jury, contrary to the Constitution of the United States and the law of the land.

To the end, therefore, that the action of the said Court of Appeals, as aforesaid, may be reviewed and determined by this honorable Court, the petitioner prays that the said Court of Appeals be required by certiorari to certify the said cause to this Court, according to the form of the statute in such case made and provided, and that in that behalf all necessary orders may be made and proceedings had.

Respectfully submitted,

GEORGE D. HORNING, Petitioner.

By Henry E. Davis,
His Attorney.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. ------.

GEORGE D. HORNING, Petitioner,

vs.

THE DISTRICT OF COLUMBIA, Respondent.

BRIEF IN SUPPORT OF PETITION.

I.

Statement of the Case.

Petitioner, a pawnbroker, was charged by respondent in the Police Court of the District of Columbia with violation of the Act of Congress of February 4, 1913, namely, in engaging in the business of loaning money on security at a greater rate of interest than six per cent. per annum, without having procured a license so to do.

The information sets forth in great detail the acts charged to have been done by the petitioner as constituting a violation of the Act (Rec. 2-9). Of his own motion, the judge at the time presiding in the Police

Court quashed the information, upon the ground that as matter of law the facts set forth did not constitute a violation of the Act.

On writ of error procured by respondent, the Court of Appeals of the District of Columbia reversed the action of the Police Court and remanded the information for trial.

In its opinion (47 App. D. C., 413, 421), the Court of Appeals enumerated nine elements as involved in the business of a pawnbroker, as conducted by petitioner, of which it said that five were performed in his Washington office, and the remainder in his Virginia office. On the trial petitioner contended that the testimony showed that no one of the five elements enumerated by the Court of Appeals as performed in the District of Columbia was in fact there performed, and asked and requested five separate instructions to the jury, upon which, if granted, petitioner might have contended and the jury might have found accordingly (Rec. 37-8), necessitating a verdict of not guilty.

The trial Court refused each of the requested instructions, and of its own motion charged the jury that there was no contradiction in the testimony of the witnesses; that the only question for the jury to decide was whether it believed the witnesses; that if the jury believed the witnesses its verdict should be one of conviction, and that if it did not believe the witnesses the jury was at liberty to acquit, and should acquit petitioner; adding that if the jury believed the testimony of the witnesses it was its duty to bring in a verdict of guilty. To this charge of the Court exception was duly taken (Rec. 40).

At five o'clock in the afternoon of the day of the trial the jury retired and remained out all night. The

following morning, the jury being recalled to the Court room, the Court delivered a further charge, in which, after stating that the law makes the jury sole judges of the credibility of witnesses and the weight of the evidence, and where there is conflict between the evidence for the Government and evidence for the accused it is the jury's exclusive province to weigh the evidence and determine where the truth lies, added "but we have not a case of that kind here, in the case at bar there is no conflict in the evidence upon any material point," and closed by saying (Rec. 41):

> "In a criminal case the Court cannot peremptorily instruct the jury to find the defendant guilty. *If the law permitted I would do so in this case.*
>
> "In conclusion, I will say to you that a failure by you to bring in a verdict in this case can arise only from a wilful and flagrant disregard of the evidence and the law as I have given it to you, and *a violation of your obligation as jurors.*"

Upon due exception by petitioner to this as amounting to a peremptory instruction to the jury, the Court added:

> "Of course, gentlemen of the jury, I cannot tell you in so many words, to find the defendant guilty, *but what I say amounts to that.* The facts proven before you are in accord with the information. The Court of Appeals has said that that constitutes a violation of the law and *that is all there is in the case.*"

Upon petitioner's repeating his objection and exception to the language of the Court as an invasion of the province of the jury, the Court added further:

> "As I have told you, gentlemen, even if I am in error, it is your duty to accept the law as I have given it to you."

And thereupon petitioner excepted on the ground that the only effect of this could be coercion of the jury, and moved the Court to discharge the jury from further consideration of the case, which was refused, and exception taken (Rec. 41).

In its opinion the Court of Appeals, ignoring the instructions requested by petitioner and refused by the Police Court,—*which instructions were based upon evidence presented by petitioner for the express purpose of establishing that no detail of his business was transacted in the District of Columbia*—considered only the instructions given to the jury, after quoting from which the Court of Appeals said:

> "The trial justice *made it clear* that the jurors are the *sole* judges of fact; that he had no power to peremptorily instruct a verdict of guilty, and that, notwithstanding any opinion he might express, the *ultimate decision of guilt* or innocence *resided in the jury.*" (Rec. 51).

And the Court said further:

> "The jury, however, was not divested of the *freedom* to exercise arbitrary power. On the contrary it was *expressly* told it that it possessed that power." (Rec. 52).

It is deferentially but positively insisted that each portion of the opinion of the Court of Appeals thus quoted is without support by the Record; and it is with equal positiveness and confidence submitted that the

entire language of the trial judge will be read in vain to find anything remotely akin thereto. In a word, it is a perfectly fair summary of the instructions of the trial judge to say that they amount to no more than this: "Usually a jury has something to do in a case, but not this time."

Again in its opinion the Court of Appeals, speaking of the case of *Masters* vs. *United States,* 42 App. D. C., 350, one of its own decisions relied upon by petitioner, says:

> "We held in that case that error was committed in refusing to admit certain testimony, which, if admitted, would have presented a sharp issue of fact for the jury." (Rec. 57).

How far from the fact is this the most cursory reading of the case shows.

In that case the trial Court refused admission of certain testimony offered by defendants, but *upon the testimony admitted* instructed the jury in language which the Court of Appeals found to constitute reversible error, *wholly without reference to the testimony rejected*; and in reversing the trial Court the Court of Appeals used this explicit language:

> *"The Court stated that no issue of fact existed, and applying the law to the facts thus found by the Court to be established declared that the defendants were guilty and instructed the jury that it ought so to find."*

Language more appropriate to the instant case cannot well be conceived.

And it was not until *after having thus decided and effectually disposed of the case for the purpose of reversal,* that the Court of Appeals proceeded in its opinion to say that the trial court fell into error in interpreting the statute under which defendants were indicted to mean one thing, whereas it meant more, and that for this reason the rejected testimony should have been admitted; thereby finding another error *in addition to and independent of that for which the judgment below already stood reversed.*

How far this is from justifying the Court of Appeals in saying in the instant case that the *Masters* case was decided as it was *because* the rejected testimony, if admitted, "would have presented a sharp issue of fact" is surely too obvious for comment.

It is a fair and respectful paraphrase in abstract of the opinion of the Court of Appeals under consideration to say that it amounts to this:

A trial judge may tell the jury that it should, and if not recreant to its oath would, find a defendant guilty, and that while it has the power, it has not the right, to find him not guilty, and this is not error, provided that a verdict of not guilty ought not to be rendered on the evidence as viewed by the Court.

Says the Court of Appeals, speaking of the jury:

> "They had the arbitrary power, but not the *right,* to return a verdict of not guilty. * * * There was no *lawful* power vested in the jury to acquit defendant. In convicting him, no right of his was violated, since *he had no right to acquittal.* The right of trial by jury guaranteed by the Constitution is the right to a *lawful* trial when the jury is governed in its deliberations by the law as given by the Court."

(Rec. pp 51 & 52)

Comment upon this is sufficiently made by the Court of Appeals itself in its previous language in the *Masters* case, as follows (47 App. D. C., 353-4):

> "Of course, it is beyond the power of a court to instruct a jury to return a verdict of guilty in a criminal case, *either directly or indirectly by the use of language which amounts to the direction of a verdict.* * * * It would be a judicial frittering away of the citizens' Constitutional rights to hold that the charge of the court in this case did not amount to a direction to return a verdict of guilty. * * * *Indeed, the instruction was so explicit that the jury would have been justified in regarding it as a direct violation of the mandate of the court had it not returned a verdict of not guilty.*"

Again says the Court of Appeals in its opinion in the instant case:

> "Here, it is *conceded* there is no issue of fact, and the present decision, it must be remembered, rests solely upon that unique position." (Rec. p. 51)

To the contrary of this, the five instructions requested by the petitioner and refused by the trial Court, above mentioned, were upon the distinct ground that in order to a verdict of guilty the jury must find the five elements of petitioner's business, or at least one of them, said by the Court of Appeals in its first opinion in the case to have been performed by him in the District of Columbia, in fact to have been there performed, and that the testimony showed that in fact no one of them was there performed. It is obvious that if the trial Court took the same view of the testimony as was contended for by petitioner, the fifth request (being

for a directed verdict of acquittal) should have been granted; and that had the first four of the instructions been granted and the jury had found the facts in accordance with petitioner's contention, there must have been a verdict of acquittal. But the immediate point is that the rejected instructions presented petitioner to the jury as claiming, as fairly he might, that the testimony not only failed to show the performance by him in the District of Columbia of any one of the details of his business under consideration, but also fairly and convincingly showed the contrary. A more direct contention creating an issue of fact for consideration by the jury, or one more distant from concession to the contrary, it is impossible to conceive.

To resume the whole matter:

It was not conceded, nor does the record show, that there was no issue of fact in the case. On the contrary, the evidence offered by petitioner had for its distinct object the establishment of the fact that no one of the five details of his business previously declared by the Court of Appeals, *upon consideration of the information only*, to have been performed in the District of Columbia was in fact there performed; and this raised, however slightly, distinct and separate issues of fact for the jury's determination, issues which the Court could not withdraw from that determination; and the trial Court refused specific requests of petitioner for instruction to the jury bearing upon the issues of fact thus presented, which action of the trial Court the Court of Appeals passed without notice.

As above stated, the Court of Appeals affirmed the trial Court upon the single clear-cut proposition that **a trial judge may tell the jury that it should, and if not**

recreant to its oath would, find a defendant guilty and that while it has the power, it has not the right, to find him not guilty, and this is not error, provided that a verdict of not guilty ought not to be rendered on the evidence as viewed by the Court.

How this differs in fact from a specific direction by a court of a verdict of guilty in a criminal case, or in principle from assertion of the right of a court to set aside a verdict of not guilty in such a case, if in the opinion of the court such verdict should not have been rendered, counsel is unable to discern.

And the opinion and decision under consideration being by the Court of last resort in ordinary in the District of Columbia, a concededly Federal Court, and one sitting under the shadow of the building in which sits the highest tribunal of the land, the certainty of citation and the high probability of application of the opinion and decision in question by the other Federal tribunals of the land would seem obviously to require the granting of the petition herein, as presenting a question not only of the widest and most general Federal interest, but also of the Constitutional right of every citizen, highest and lowest alike.

Respectfully submitted,

HENRY E. DAVIS,
Attorney for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 9[redacted]3[redacted]77

GEORGE D. HORNING, PETITIONER,

vs.

THE DISTRICT OF COLUMBIA, RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CONRAD H. SYME,
P. H. MARSHALL,
Attorneys for Respondent.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No.

GEORGE D. HORNING, PETITIONER,

vs.

THE DISTRICT OF COLUMBIA, RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

George D. Horning was convicted in the police court of the District of Columbia of a misdemeanor, for engaging, in said District, in the business of loaning money on security upon a rate of interest greater than 6 per cent per annum, in violation of the Act of February 4, 1913 (37 Stat. L., 657), and was sentenced to pay a fine of $50.

The record discloses that an information was filed against Horning, charging this offense in great detail, which information was quashed by the judge of the police court, upon

the ground that, as matter of law, the facts therein set forth did not constitute an offense under the Act aforesaid.

On writ of error allowed to the District of Columbia, the Court of Appeals examined the information, held that the facts charged therein did not constitute a violation of said Act of Congress, and remanded the case to the police court for further proceedings.

Thereafter the case came on for trial, and defendant therein demanded a trial by jury, and from a verdict of guilty and judgment thereon was allowed a writ of error to the Court of Appeals, which affirmed the judgment and sentence aforesaid. He now petitions this Honorable Court for the writ of certiorari to the Court of Appeals of the District of Columbia to review its action upon the second writ of error.

ARGUMENT.

Counsel for petitioner complains:

1. That the verdict of the jury in the police court was coerced.

2. That error was committed in refusing certain instructions prayed on behalf of defendant in the police court, which, if granted, would have presented issues of fact.

Concerning the first error alleged, the opinion of the Court of Appeals disposes thereof, adversely to the contentions of petitioner, in such a thorough and convincing manner that it would be presumptuous on the part of counsel for the District of Columbia to attempt any addition to or improvement upon the argument contained in the opinion itself. The opinion makes it perfectly clear that petitioner complains to this court, not that he did not receive a *fair* trial by an *impartial* jury in the police court, but because he did not receive an *unfair* trial, by a *partial* jury, acquitting him of an offense the commission of which he admitted when testifying as a witness in his own behalf.

Petitioner possesses the unique distinction of having entered a formal plea of not guilty of the offense charged against him, demanded a jury trial, and then taken the witness stand and testified to the commission by him of every act charged against him in the information, and determined by the Court of Appeals to constitute, as matter of law, the offense charged. A parallel case would be for a defendant, charged with assault with a dangerous weapon, to plead not guilty, and then testify that he deliberately shot at the prosecuting witness, with a revolver, without any provocation or extenuating circumstances; and, nevertheless, ask a verdict of acquittal and then complain if the jurors performed their plain duty, and brought in a verdict of guilty.

An examination of the record in this case, and particularly of the testimony of petitioner himself, and of the witnesses called on his behalf, removes every possibility of doubt as to his guilt, and demonstrates beyond question that he is not complaining of a miscarriage of justice, but because one did not take place for his benefit.

The Court of Appeals said, "Defendant, by his testimony, admitted the facts as completely as he could have done by a plea of guilty," and then pertinently inquires, "How far may a defendant rely upon the exercise of arbitrary power by a jury and complain if the jury disappoints his expectations?"

As to the second contention advanced by petitioner, that the refusal of his instructions deprived him of the benefit of issues of fact which would have been presented to the jury by such instructions.

The Court of Appeals had considered all of the facts involved in the charge against petitioner, which were set out in detail in the information reviewed by that Court upon the first writ of error, and which were identically the same facts proved before the jury, and admitted by petitioner.

What he really sought by the instructions requested, was to have the jury reach a different conclusion as to his guilt from that which the Court of Appeals had declared would

follow the proof of the facts alleged in the information, and, in effect, to have the jury review and overrule the Court of Appeals upon matters of law.

He now complains because, although he testified to the commission of every act which the Court of Appeals declared to constitute the offense with which he was charged, the jury was not permitted to consider whether these acts did constitute a violation of the law, in spite of the opinion of the Court of Appeals that they did.

The statement of such a proposition contains its own refutation.

We confidently submit that no cause has been shown sufficient to require the issuance of the writ of certiorari in this case.

Respectfully submitted,

CONRAD H. SYME,
P. H. MARSHALL,
Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. [redacted]77

GEORGE D. HORNING, *Petitioner*,

vs.

THE DISTRICT OF COLUMBIA.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PETITIONER.

HENRY E. DAVIS,
Attorney for Petitioner.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 323.

GEORGE D. HORNING, *Petitioner,*

vs.

THE DISTRICT OF COLUMBIA.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PETITIONER.

I.

Statement of the Case.

This is a case on certiorari to the Court of Appeals of the District of Columbia to review the judgment of that Court in affirming the judgment of the Police Court of the District of Columbia.

In the latter Court an information was filed by the District of Columbia (hereinafter called District) against the petitioner (hereinafter called defendant), charging him with violation of the Act of Congress of February 4, 1913 (37 Stats. L., 657), entitled "An Act

to Regulate the business of loaning money on security of any kind by persons, firms, and corporations other than national banks, licensed bankers, trust companies, savings banks, building and loan associations, and real estate brokers in the District of Columbia."

Upon its filing, and before defendant's arraignment thereon, the judge of the Police Court presiding, of his own motion, quashed the information; and the Court of Appeals of the District of Columbia, on writ of error allowed the District, reversed that judgment and remanded the case with instructions to vacate the order quashing the information, and for further proceedings (*District of Columbia* v. *Horning*, 47 App. D. C. 413).

Thereupon, defendant being arraigned pleaded not guilty, and was tried by the Court and a jury, which latter returned a verdict of guilty (Rec., 9), and defendant was sentenced accordingly (Rec., 46).

On the trial the judge presiding was asked, among other things, to instruct the jury respecting the essentiality to the carrying on of his business by defendant of sundry acts appearing from the evidence, but declined so to do, and in effect told the jury that he, the judge, found the facts disclosed by the evidence to be such as the Court of Appeals had held to constitute a violation of the law, concluding with what was admittedly in substance and effect a peremptory instruction to the jury to find the defendant guilty, and an admonition, not to say adjuration, to the jurors that their failure so to find could arise only from a wilful and flagrant disregard of their oaths (Rec., 41, f. 41).

To this instruction defendant duly excepted (Rec., 41, f. 41), and also moved the Court to discharge the jury from further consideration of the case, upon the

ground that the only effect of the action of the Court could be coercion of the jury (Rec., 42).

A writ of error was duly allowed defendant (Rec., 1), and on hearing the same the Court of Appeals (hereinafter called "Court below"), affirmed the judgment of the Police Court (Rec., 53, f. 57).

II.

Assignments of Error.

The Court below erred as follows:

1. In not sustaining each and every of the errors assigned in that Court.

2. In holding that the conduct of defendant's business as disclosed by the evidence constituted the doing by him of business in the District of Columbia.

3. In holding that the Judge of the Police Court of the District of Columbia did not err in instructing the jury to find the defendant guilty.

4. In holding that the Judge of the Police Court did not in effect so instruct the jury.

5. In holding that it was not error for the Judge of the Police Court to overrule defendant's motion to discharge the jury from further consideration of the case upon the ground that by his charge the verdict of the jury was coerced.

6. In not reversing the judgment of the Police Court.

7. In affirming the judgment of the Police Court.

In the Court below the errors assigned were that the Police Court erred as follows:

1-4. In refusing to grant defendant's prayers Nos. 1. 2. 3 and 4, respectively, for instruction to the jury.

5. In refusing to grant defendant's prayer No. 5, directing a verdict for defendant.

6. In instructing the jury as in and by the Court's charge given of its own motion appears.

7-11. In directing the jury in effect peremptorily to find a verdict of guilty.

12. In overruling defendant's motion to discharge the jury from further consideration of the case.

III.

Argument.

As the case was presented to the Court below in accordance with the scheme of the assignment of errors there made, the same will for convenience, as well as for the better elucidation of the action of the Court now sought to be reviewed, be followed herein.

1. As the trial in the Police Court followed the previous consideration of the case by the Court below, and was had in the light of the opinion thereon rendered, it will be helpful in the outset of the argument to give the latter Court's view of the information and of the applicability of the matters thereby charged to the question whether a violation of the Act of Congress therefrom appeared.

The information alleges that defendant maintained in the City of Washington, District of Columbia, a place of business, called "Warehouse. Formerly Loan Office," by posted notice declared to be "exclusively for storage purposes" and for the settlement of loans made prior to the operation of the Act on which the information is based, the notice further an-

nouncing, "no application for loans will be received or considered here, and no examination, appraisement or valuation of pledges will be made here"; that defendant advertised in the newspapers of the city a place of business, for making loans, in the State of Virginia, and "free automobile" thereto from the Washington establishment; and that at the latter there was a branch office of a general messenger service in which defendant had no financial interest except that he hired it space in his place of business.

The substantial charges of the information are thus stated by the Court in its opinion on the earlier writ of error (47 App. D. C. 415-17):

> "It is charged that at divers times prior to the filing of the information, persons applied at the Washington office of defendant to make loans, and exhibited jewelry and other property which they desired to deposit as security therefor; that they were told that the jewelry or property would not be appraised or valued for loan purposes in the District of Columbia, and that no loans upon the security thereof would be made in the District, but that they might either send the articles to defendant's Virginia office by a messenger from the messenger service company, for which service they would have to pay ten cents, or defendant would send them to the Virginia office free of charge in one of his passenger automobiles, a number of which were kept on hand at the Washington office for this purpose; that when articles were sent by messenger a receipt for the articles was given by the messenger service company, and the articles were taken to the Virginia office, where they were appraised and a pawn ticket and the sum of money loaned delivered to the messenger, who returned to the Washington office and delivered

them to the borrower; that when the borrower was transported by automobile the money and pawn ticket were delivered to him at the Virginia office, and he was returned by the automobile either to the Washington office or to any other point in the District to which he desired to be taken, and that when the borrower desired to pay the loan he presented his money and pawn ticket at the Washington office, where he was directed either to send them by messenger to the Virginia office, or take them himself by one of defendant's automobiles, where a warehouse receipt or redemption ticket was given either to the messenger to deliver to the borrower or to the borrower direct, as the case might be, which receipt was presented by the borrower at the Washington office, where he received his property.

"It is sought by the information to charge a violation of the provisions of the Act of Congress of February 4, 1913 (37 Stats. L., 657), entitled 'An Act to regulate the business of loaning money on security of any kind by persons, firms, and corporations other than national banks, licensed bankers, trust companies, saving banks, building and loan associations and real estate brokers in the District of Columbia.' It provides, among other things, 'That hereafter it shall be unlawful and illegal to engage in the District of Columbia in the business of loaning money upon which a rate of interest greater than six per centum per annum is charged on any security of any kind, direct or collateral, tangible or intangible, without procuring license.' The Act then provides that licensees may charge not exceeding 'one per centum per month on the actual amount of the loan, and this charge shall cover all fees, expenses, demands, and services of every character, including notarial and recording fees and charges, except upon the fore-

closure of the security.' In the present case, defendant in error is charged with conducting a loan business in the District of Columbia without a license and with charging a greater rate of interest than six per cent, to wit, three per cent per month, for each month or fraction thereof."

Having before it only the information, its allegations and charges, the Court, after disposing of questions not now involved, dealt with the sufficiency of the information as follows (47 App. D. C. 421-3):

"Coming to the sufficiency of the information to charge an offense under the statute, it will be observed that the act in question declared it unlawful 'to engage in the District of Columbia in the business of loaning money upon which a rate of interest greater than six per centum per annum is charged on any security of any kind, without first obtaining a license to do so. Defendant had not taken out a license under the act. He is charged with doing business without a license, and with charging interest rates prohibited by the act even if he had taken out a license. The gravemen of the offense here charged is engaging in the business of loaning money in the District of Columbia in a manner prohibited by law. It is conceded that, if done in the District, the acts came within the prohibition of the statute; but it is argued that the information fails to charge that defendant engaged in the business of loaning money upon security in the District of Columbia.

"The business of a pawn broker, as conducted by defendant through his combined District and Virginia offices, consists of a number of elements: (1) a place where applications for loans are made; (2) the application for the loan; (3) the disclosure

of the security; (4) the appraisement of the security; (5) the agreement for the loan and for its repayment; (6) the payment of the money to the borrower and the delivery of the pledge to the broker; (7) the safe-keeping by the pledgee of the property pledged; (8) the payment of the loan, with agreed interest, and, (9) the return of the pledge. It will be observed that of the elements entering into the transaction five of the nine (1, 2, 3, 7 and 9) were performed in the Washington office.

"It appears from the record that defendant conducted a licensed pawn brokers' business at his Washington office prior to the passage of the statute here in question; that he then obtained a license in Virginia and established an office just across the Potomac River at the 'south end of Highway Bridge'; that he continued to advertise his Washington office in connection with the conducting of his loan business; that he established free automobile service for those who applied for loans at the Washington office to transport them to and from the Virginia office; that all that was done at the Virginia office was to appraise the security, deliver the money loaned and to accept repayment of the loan; that the property pawned was brought back by defendant from the Virginia office and kept in the Washington office, and that, when the loan was paid off at the Virginia office, a receipt was given the borrower and he was directed to present it at the Washington office, where the property pledged would be delivered to him. From the foregoing, it may be said that the business of a pawn broker was not exclusively carried on either in the Washington or Virginia office, since it took the transactions at both offices to completely enable defendant to engage in the business.

"This is not a contract, the enforcement of

which is dependent upon the law of the jurisdiction in which it is to be performed, nor is it a proceeding for the enforcement of a contract. It is a criminal action to punish the doing of an unlawful business in this District. We are not, therefore, concerned with the validity or invalidity of defendant's contracts in the State of Virginia. Citation of authority respecting the jurisdiction of courts to enforce contracts made in one State to be performed in another have no analogy. The law denounces the business; and when it appears that one is engaged in transactions which come, in whole or in part, within the prohibition of the statute, he will be held to be doing business within the purview of the act. We are not dealing with a contract which is against public policy, but with a business conducted in such manner as to make it unlawful and against public policy.

"Laws of this sort are enacted for the protection of the public, and courts look with disfavor upon attempts, by circumvention or subterfuge, to escape their restrictions. True, a lawful act may not be condemned merely because the person doing it had a bad motive, but where the unlawfulness of the act is at issue, and the actor selects an unusual method for the express purpose of evading the law, the means employed become quite material in characterizing the transaction. Cook vs. Marshall County, 196 U. S., 261. Considering, therefore, the whole transaction, it amounts, in our opinion, to nothing less than an attempt to continue the pawn brokerage business at the original Washington office unfettered by the restrictions of a local license. The branch office conducted under color of a Virginia license at the 'south end of Highway Bridge,' with its transportation facilities, either by private automobile

service furnished by defendant or the dime messenger service, or otherwise, is a mere agency of the local or main concern. Through this device defendant seeks to escape the penalties of the law and continue to conduct an unlawful business in this District. The Virginia branch was opened for this purpose, not through a desire to establish a legitimate business in that State, but to enable defendant to conduct a prohibited business here.

"The statute here is not aimed at the prohibition of a well-defined act which is in itself criminal, but at the regulation of a business, which if conducted in a manner prohibited by the statute, is declared to be against public policy, and which subjects the person engaging therein to the penalties prescribed in the act. The conducting of a business consists of many elements and many separate acts, and when it appears that any of the acts essential to the complete transaction of the business have been carried on within the jurisdiction where the doing of business is prohibited, the transgressor will be held to come within the limitations of the act. The rule of strict construction as applied to criminal statutes is relaxed in the interpretation of an act designed to declare and enforce a principle of public policy. We must keep in mind the purpose of the legislation and the evils sought to be prohibited, and, if possible, give force and effect to the legislative intent. United States vs. Corbett, 215 U. S., 233; District of Columbia vs. Dewalt, 31 App. D. C., 326, 36 Wash. Law Rep., 396; United States vs. Cella, *supra.*"

2. As is seen, as respects the violation of the Act in question, (which, as it is accurately said, "is not aimed at the prohibition of a well-defined act which is in itself criminal, but at the regulation of a busi-

ness," the gist of the opinion is that, as "the conducting of a business consists of many elements and many separate acts, and when it appears that any of the acts essential to the complete transaction of the business have been carried on within the jurisdiction where the doing of business is prohibited, the transgressor will be held to come within the limitations of the Act,") the central and controlling question accordingly is whether any of the acts appearing from the evidence to have been done by defendant in the District of Columbia was so essential to the transaction of his business as to bring him within the law relied upon.

It is in this understanding of the Court's first opinion that the first four errors were assigned below.

In dealing with these it was not overlooked that in this opinion the Court had enumerated nine elements as entering into "the business of a pawnbroker, as conducted by defendant through his combined District and Virginia offices," of which nine it is said that five were performed in the Washington office, namely, those numbered (1), (2), (3), (7) and (9).

The nine elements thus enumerated are as follows:

(1) A place where applications for loans are made.

(2) The application for the loan.

(3) The disclosure of the security.

(4) The appraisement of the security.

(5) The agreement for the loan and for its repayment.

(6) The payment of the money to the borrower and the delivery of the pledge to the broker.

(7) The safe-keeping by the pledgee of the property pledged.

(8) The payment of the loan, with agreed interest.
(9) The return of the pledge.

Of course, in stating the five of these elements which it mentions as being performed in the Washington office, the Court in its opinion meant that the allegations of the information so stated, and nothing more, for the Court when then speaking had before it the information only and no evidence whatever; and, obviously, upon the trial it became a question of fact as to each of these elements whether the same was or was not performed in that office.

Dealing with the evidence, and stating it as strongly as possible against defendant, what was done respecting the first three, namely, those numbered (1), (2) and (3), was this: an intending borrower went to defendant's Washington office to apply for a loan, having with him, and exhibiting, the security intended to be offered therefor. Upon stating his mission, he was told that no application for a loan could be made there, that no security offered would be appraised, and, in fact, no comment would be made thereon in respect of its sufficiency, but that the intending borrower might secure a loan at the Virginia office, which he might reach by one of defendant's automobiles without charge, or by any other means of transportation of his own choosing, or to which he might send his application and security by messenger.

Very clearly, did the matter stop here, there would be no case of an application received or security considered by defendant in the District of Columbia, and there would have been no loan of money either within or without the District; and in order to a loan, it was necessary for the intending borrower, as of his own initiative, either personally or by messenger to make

his application and present his security at the only place where either would be considered by defendant, namely, the Virginia office.

Equally clearly, did the defendant or his representative at the Virginia office not regard the security offered as sufficient, the matter would stop there, and there would yet be no loan.

In legal contemplation, the substance and effect of this may be accurately stated thus: the intending borrower, not being invited there for that purpose, went to the Washington office and expressed his wish to make a loan; being told that he could there do nothing in connection with the transaction, he was informed that he might make the transaction at another establishment of defendant in another jurisdiction, the means of reaching which for the purpose were indicated to him; he had the option of dropping the matter there or of taking it up in the other jurisdiction; and having decided upon the latter course, the transaction was there had or not, according as the security offered was deemed sufficient or not—in other words, according as defendant there determined whether to have the transaction or not. And it is not unimportant to note that no advertisement by defendant of his business indicated his Washington office as a place to be visited for the purpose of any application for a loan; that defendant's advertisements were only of business to be transacted at his Virginia office; that the signs in and about his Washington office definitely and specifically gave notice that no application would be received or considered there, and no examination, appraisement or valuation of pledges would be made there; and that the only tender of service by defendant was of his free automobiles in which his intending

customers might be carried to and brought back from the Virginia office.

In the light of this and of the evidence given at the trial, it is an unavoidable conclusion that any attempt at application for a loan at the Washington office was wholly without defendant's invitation in that behalf, wholly on the initiative of the intending borrower, and wholly without any reasonable or proper expectation on his part that the same would be received. Surely argument is not expected to the proposition that, in such a state of case, defendant can in no sense and to no extent be charged with having in the District of Columbia a place where applications would be received or were even invited. Having no evidence before it, and being guided solely by the information, the Court, in its opinion, might well speak of the Washington office as "a place where applications for loans are made," but it is not believed that the Court could properly do so in the light of the actual facts as disclosed by the evidence.

And in this immediate connection it is pertinent to note the following language of the Court in its opinion, following the citation of a case in this Court (47 App. D. C. 422-3):

> "Considering, therefore, the whole transaction, it amounts, in our opinion, to nothing less than an attempt to continue the pawn brokerage business at the original Washington office unfettered by the restrictions of a local license. The branch office conducted under color of a Virginia license at the 'south end of Highway Bridge,' with its transportation facilities, either by private automobile service furnished by defendant or the dime messenger service, or otherwise, is a mere agency

of the local or main concern. Through this device defendant seeks to escape the penalties of the law and continue to conduct an unlawful business in this District. The Virginia branch was opened for this purpose, not through a desire to establish a legitimate business in that State, but to enable defendant to conduct a prohibited business here."

Again it is in order to note that this language was used in the light of the information only, and upon its allegations.

In the case in this Court, cited in the opinion immediately preceding this quotation therefrom, this Court said:

"While it is doubtless true that a perfectly lawful act may not be impugned by the fact that the person doing the act was impelled thereto by a bad motive, yet, where the lawfulness or unlawfulness of the act is made an issue, the intent of the actor may have a material bearing in characterizing the transaction. We have had frequent occasions to treat of this subject in passing upon the validity of legislative acts or municipal ordinances. So, where the lawfulness of the method used for transporting goods from one State to another is questioned, it may be shown that the intent of the party concerned was not to select the usual and ordinary method of transportion, but an unusual and more expensive one, for the express purpose of evading or defying the police laws of the State. If the natural result of such method be to render inoperative laws intended for protection of the people, it is pertinent to inquire whether the act was not done for that purpose."

Cook vs. Marshall Co., 796 U. S. 261, 271-2.

And also said this Court, in the same case:

> "Undoubtedly a law may sometimes be successfully and legally avoided if not evaded." *Id.*, 273.

And obviously so: avoidance, as distinguished from evasion, of a given law may be in perfect good faith and effective; as where one facing the possible application to himself of two laws puts himself in a position to escape the operation of one and to subject himself to the operation of the other. In such case the former law is successfully avoided and the latter made applicable and operative, but no one would seriously contend that under the circumstances the former law would be applied to the case. The law of a given jurisdiction cannot have extra-territorial operation, and one in good faith taking himself out of a jurisdiction into a territory where the law cannot operate upon him does not evade the law, he simply gets beyond the field of its operation, in a word, he avoids the law; and for purposes of enforcement a law avoided is no law.

Very clearly, therefore, the question whether acts charged upon a defendant constitute an intentional but unsuccessful endeavor to avoid the operation of a law, or even to evade it, turns not only upon the acts done by the defendant but also and especially upon his intention in the premises.

And, while upon consideration of the information and its allegations alone, the language of the Court below just quoted may have been justified, it is deferentially but confidently submitted that it can not be in the light of the testimony of defendant herein, which was the only testimony upon the point given in the case, as follows: anticipating that the Act upon which the in-

formation is based would become a law, and before it was signed, defendant sought the advice of counsel about moving his entire business to Virginia and conducting it under a Virginia license; he went to Virginia, bought a lot and contracted for a building and office; and after the enactment of the Act, namely, in April, 1913, he opened his place in Virginia. He was advised that he could do business in Virginia, and as respects the pledges that he had a property therein in bailment, that he had a right to store them in any place he chose so long as he was in a position to deliver them back to their owners, and that he selected Washington as his storehouse because he had an office there well equipped for taking care of the pledges. (Rec., 34, ff. 33-4.)

This leads naturally to a consideration of the remaining two, namely, those numbered (7) and (9), of the five elements said by the Court below to enter into the transaction of defendant's business, and as being performed in the Washington office.

Of these, that numbered (7) is "the safe keeping by the pledgee of the property pledged," and that numbered (9) is "the return of the pledge."

Passing for the moment the question whether as matter of either fact or law either of these elements enters into the transaction of defendant's business, in the sense in which that business is affected or liable to be by the Act of Congress under consideration, the relation in law of defendant to pledges taken by him as security for loans made by him is so clearly defined and so accurately described in a work of accepted authority, and the numerous cases cited in support of its text, as to call for but brief citation therefrom, and therefrom only.

"In the case of a valid pledge the pledgee acquires a lien on the thing pledged, to the extent of the indebtedness secured, which is usually held to continue as long as he retains possession thereof, either actual or symbolic, and the debt which it was pledged to secure remains unpaid." 21 R. C. L., 651-2.

"For the purpose for which it was pledged the right of the pledgee to the pledge is exclusive and yields to no other right which did not attach upon it in the shape of a lien, prior pledge, or some claim existing prior to the pledge, and good at law." *Id.*, 652.

"The pledgor has such a property in the article pledged as he can convey to a third person, but he has no right to the goods until the debt has been paid or the pledgee's lien otherwise discharged, and until then the pledgee has the whole present interest. * * * Whatever special interest or estate in the pledge is necessary to enable the pledgee to exercise the rights guaranteed to him, or to discharge the obligations imposed on him by the contract, will vest in him. He is entitled to maintain any action for the protection of his possession and special rights of property, not only against third persons who wrongfully interfere with the same but also against the pledgor if he wrongfully obtains or retains possession. * * * A pledgor who takes the property from the possession of the pledgee with the fraudulent intent and felonious design of depriving the latter of such possession and of his security may be convicted of larceny." *Id.*, 663-4.

And as respects the question of the *bona fides* of defendant in transferring, or undertaking to transfer,

his business to Virginia, not to evade the law but to avoid its application to him by going to a jurisdiction where it was not in force, this obviously turns upon his intention in doing what he did, and this, as always, in such cases, presents a question of fact.

> "The state of a man's mind at a given time is as much a fact as is the state of his digestion. Intention is a fact."
>
> Swift vs. Rounds, 19 R. I., 527; 33 L. R. A., 561, 563.

And this of necessity makes the question involved one for the jury and not for the Court.

The title of the Act under consideration is, "An Act to regulate the business of loaning money on security," etc., and it provides, among other things, that "it shall be unlawful and illegal to engage in the District of Columbia in the business of loaning money upon which a rate of interest greater than six per centum per annum is charged on any security of any kind * * * without procuring a license."

It will be noted not only that the Act aims at the regulation not of pawnbrokers as such but the business of loaning money on security, however carried on, but also that neither the word "pawn" nor the word "pawnbroker" appears in the Act. It is accordingly immaterial in what manner the business may be carried on: the material inquiry is whether one sought to be brought within the provisions of the Act is engaged in the business undertaken to be regulated.

And what is meant by engaging in a business is clearly settled: it does not denote a single act or transaction, but the aggregation of acts or transactions pertaining to, and in fact constituting, such business; it is continuous in its character, and is synonymous with employment or occupation, signifying that which occupies the time, attention and labor of a man for the purpose of gaining a livelihood or profit.

Hoagland vs. Segar, 38 N. J. L., 230, 237.
D. &. H. Canal Co. vs. Mahlenbrock, 63 N. J. L., 281.
Sterne vs. State, 21 Ala., 43, 46.
Martin vs. State, 59 Ala., 34, 36.

Accordingly the Act does not apply to a single act of lending money on security at whatever rate of interest; nor does it apply to the engaging in the business of lending money on security at a rate of interest not higher than six per centum per annum; nor does it apply to the engaging in the business of lending money without security at a higher rate of interest than six per centum per annum: it applies only to the engaging, in whatever manner, in the business of lending money on security at a higher rate of interest than six per centum per annum without a license so to do; and the gravamen of the offense created by the statute is, accordingly, engaging in the last-mentioned business, and such only.

In order to determine whether, and if so, where, one is engaged in such business, the initial inquiry is what constitutes a lending of money on security.

It is conceived to be not subject to argument that lending money consists in the passing of it by the

lender to the borrower, that when this is accomplished the transaction is completed, and that unless it be accomplished there is no lending of money. And where the lending is to be on security, there can be no such transaction without the passing of the security from the borrower to the lender, and when this is done, and not until it is done, the transaction of lending money on security is accomplished.

And if it be conceded that the initiative in the transaction is with the borrower, the relation of the lender to the transaction does not and can not begin until the doing by him of some act indicating a willingness and readiness to make the transaction: just as an offer does not make a contract and if not accepted by the one to whom made is as though it had never been made. Also an invitation by advertisement or otherwise by one at a given place to the public to transact business with such one at another place is not an act of the business at the place of invitation, seeing that the invitation by its very terms is to have the transaction at the other place indicated; and it can not seriously be contended that when invited to transact business at another place than the place of invitation the one invited can constitute the one extending the invitation as transacting business at the place of invitation in the face of a refusal by the latter so to do, or even to consider the so doing.

Again, when the transaction of loan on security is completed by the passing of the money from lender to borrower, and the passing of the security from borrower to lender, it is completed—nothing more, nothing less than this can be said or contended; and when the security—in law a pledge—gets into possession of the

lender, it is his, to the extent above shown, and his only obligation to the lender in respect thereof is to take care of it and to return it when the loan is paid; and the only relation of the borrower to it is that, while he may dispose of his interest in it to another, he can do so only subject to the payment of the loan, until which time both the right and the obligation of the lender remain unaffected. Apart, therefore, from the borrower's right to have the pledge back when the loan is paid, it is no concern of his how or where the lender may keep it; it is kept, in contemplation of law, as much for the lender as for the borrower. Nor is there any obligation on the lender to keep the pledge in any particular manner, or at any particular place, and neither the manner nor the place of keeping the pledge has any relation whatever to the business of lending the money secured by it.

Accordingly, if the lender has a more secure place for keeping the pledge than the place at which the transaction of lending the money upon it was had, his election there to keep the pledge, and the fact of his there keeping it, can not by any proper reasoning be referred to his lending upon it. Very few pawnbrokers have places for storing and keeping pledges apart from the places at which they make loans; one has but to traverse the streets of any city wherein pawnbrokers do business to realize this as a fact. And should even a pawnbroker elect to take the risk of keeping pledges left with him about his person or in his dwelling, such fact has, and can possibly have, no bearing upon the transaction of loan. And assuming a pawnbroker doing business on the Virginia side of the city of Bristol and having a warehouse for the storing of his pledges on the Tennessee side of the city, would or could it be

contended that any part of the transaction of lending on a pledge took place in Tennessee?

It irrefutably follows that of the nine "elements" assumed by the Court below to be included in "the business of a pawnbroker" (ante, pp. 7-8, 11-12), but two, namely those numbered (5) and (6), are actually comprised within the transaction of lending money on security—that is to say, the only transaction regulated by the Act under consideration; and, both on the hypothesis of the Court below and in the light of the concededly uncontradictory and uncontradicted evidence, each of these was exclusively performed at defendant's Virginia establishment only.

With these views in mind, the first four errors assigned in the Court below, relating to instructions refused by the Police Court, may now be considered.

(1) The first of these instructions is as follows:

> "You are instructed that to constitute an application to the defendant for a loan within the meaning of the information, it is not sufficient for the applicant merely to communicate his desire or request in that behalf to the defendant, but it is necessary further for the defendant to entertain the expression of such desire or request with a view to acting favorably upon the same, in accordance with the proposal of the applicant, and that the mere expression of the desire or request of the applicant and the declination of the defendant so to entertain the same would not constitute an application as aforesaid, within the meaning of the information." (Rec., 38.)

Had this instruction been given, as clearly it should have been, there might, and there probably would, have

been removed from the case any possibility of the finding by the jury that defendant did in the District of Columbia any act in the way of receiving, much less entertaining, any application for a loan, and as corollary thereto there would similarly have been removed any possibility of the jury's finding that he received or considered in the District of Columbia any security in connection with such an application. And there would thus have been eliminated from the case the possibility of the jury's finding to have been transacted in the District of Columbia any one of the first three of the five elements above enumerated as entering into the transaction of business by defendant in the District of Columbia.

(2) The remaining three of the four instructions under immediate consideration are as follows:

> "You are instructed that upon receiving from any person a pledge as security for a loan to such person by the defendant, the latter immediately became vested by law with a special property in such pledge as against all the world, including such person himself, until his redemption of the said pledge by repayment of the loan made thereon, and, further, that the defendant became to such person an insurer of the safety of the said pledge, and its due return upon repayment of the loan, and accordingly that it was the right of the defendant, during the continuance of the loan and until its repayment, to keep the said pledge, wheresoever and in such depository as in his judgment proper; and without regard to the locality of such depository." (Rec., 38.)

> "If you find from the evidence that in making use of his Washington premises as a warehouse

or place of storage for his pledges given him the defendant so did for the purpose of safely keeping the said pledges for his own protection against their possible loss, and to the end that he might have them for redelivery to his customers on the repayment by them of their loans, and for no other purpose, you are instructed that such use of the said premises did not constitute the carrying on by the defendant of the business of a pawnbroker or any essential incident thereto." (*Ibid.*)

"If you find from the evidence that in making use of his Washington premises as a warehouse or place of storage for pledges given him the defendant so did for the purpose of safely keeping the said pledges for his own protection against their possible loss, and to the end that he might have them for redelivery to his customers on the repayment by them of their loans, and for no other purpose, you are instructed that such use of the said premises did not constitute the carrying on by the defendant of lending money in the District of Columbia, or any essential incident thereto." (Rec., 39.)

Had these instructions been given, as also clearly they should have been, they in turn might, and probably would, have removed from the case the possibility of the finding by the jury that defendant's manner of keeping and returning pledges received by him involved any act essential to, or indeed constituting part of, the doing by him, whether in the District of Columbia or elsewhere, of the business of lending money on security; and so, also, the seventh and ninth of the elements enumerated as entering into the business of a pawnbroker, or of lending money on security by de-

fendant, in the District of Columbia would have passed from the case.

All and every of the instructions to which the errors under consideration relate involve the intention—in other words, the good faith—of defendant in the acts specified, and this—the intention or good faith of defendant—could not be determined by the mere specification of the acts, but only by ascertainment of the mind of defendant in doing them, matter exclusively within the province of the jury; wherefore, although in its earlier opinion the Court below might, as it clearly did, have suspected—nay, predetermined—the good faith of defendant in the premises, the jury alone could properly decide the question, and it accordingly was palpable error in the Police Court in instructing the jury to assume, as it did, that the suspicion or predetermination of the Court below, on the mere specification of the acts, and in the absence of evidence, was conclusive of the matter, and forestalled and canceled the right and duty of the jury to determine for itself the question of defendant's good faith in the light of the evidence.

Wherefore, had the four instructions considered been given, there would have remained in the case of the nine elements enumerated only those indicated by the Court below as not to have been transacted in the District of Columbia, and, indeed, the only elements entering into and constituting the lending of money on security within the meaning of that expression as above shown; and a verdict of not guilty must inevitably have followed.

3. The fifth assignment of error in the Court below was based upon the refusal of the Police Court to instruct the jury that upon the whole evidence in the case its verdict should be not guilty.

This instruction was asked on the assumption that the preceding four would be granted, as the only evidence in the case bearing upon the facts, on the hypothesis of which the preceding four instructions were prayed, was directly and exclusively in support of that hypothesis. Wherefore, the granting by the Police Court of the preceding four instructions might, and probably would, as above indicated, have removed the possibility of the jury's finding to have been performed in the District of Columbia any of the aforementioned elements, namely, those numbered (1), (2), (3), (7) and (9), mentioned by the Court below as appearing from the information there to have been performed; and the necessary result of this would have been a verdict of acquittal.

4. Of the remaining assignments of error below, those numbered from six to eleven, inclusive, were based upon the Police Court's peremptorily, in effect, directing the jury to find a verdict of guilty.

That these assignments were well made conclusively and abundantly appears from the most casual reading of the Court's charge to the jury, both in the first instance and after the jury had been recalled to the court room on the morning of the day following its retirement to consider of its verdict.

A few extracts from the charge sufficiently characterize it.

Thus said the Court:

> "There is no contradiction here in the testimony of these witnesses as to the acts and transactions engaged in and had in the management of

this business that was conducted, whether it was conducted here or in Virginia." (Rec., 40, f. 40.)

"As to what constitutes an engaging in business, that is not a question for you gentlemen to determine in this case, because you are instructed that if these witnesses told the truth about the matter that was an engaging in business in the District of Columbia, within the meaning of the law." (*Ibid.*)

"If you believe the testimony of these witnesses who have recited these facts to you here, it is your duty, then, under these instructions, to bring in a verdict of guilty in this case." (Rec., 40, f. 40.)

"There is really no issue of fact for you to decide." (Rec., 41, f. 41.)

"In a criminal case the Court can not peremptorily instruct the jury to find the defendant guilty. If the law permitted I would do so in this case.

"In conclusion, I will say to you that a failure by you to bring in a verdict in this case can arise only from a willful and flagrant disregard of the evidence and the law as I have given it to you, and a violation of your obligation as jurors. * * *

"Of course, gentlemen of the jury, I can not tell you, in so many words, to find the defendant guilty, but what I say amounts to that. The facts proved before you are in accord with the information. The Court of Appeals has said that that constitutes a violation of the law; and that is all there is in the case." (Rec., 41, f. 41.)

The Court below itself, in a well considered case, was supposed to have precluded argument of the point that this constitutes palpable, and indeed fla-

grant, error; palpable, because of the language of that Court, and flagrant, because the error was persisted in over the citation of its previously rendered opinion.

In the case referred to, the Court below, in stating the case, said:

> "There is no conflict as to the facts. The details of the transaction, as proven, are admitted by defendants. * * * The chief complaint relates to the charge of the Court."

The language of the trial Court so complained of, and for which error was assigned, was as follows:

> " 'Ordinarily, I tell a jury that they must find beyond a reasonable doubt; but here the evidence is practically beyond any dispute. Almost all of it, the facts as to almost all of these matters are stated by the defendants themselves in substantially the same way as stated by the other witnesses, and the counsel have not cared to argue the question as to whether the facts I have referred to are established beyond a reasonable doubt, in view of the law as held by the Court. So that you will probably have no difficulty upon that branch of the case. I can not, in a criminal case, order a verdict. In a civil case, the Court may direct a verdict, but in all criminal cases the jury are bound to return the verdict themselves, but are called upon to take the law from the Court, because in that way the rights of the parties can be preserved. So, my instruction is that the law is such, upon the undisputed evidence in the case, that you ought to render a verdict of "guilty"

upon the counts I have submitted to you, and of "not guilty" upon the other counts.' "

And the error assigned was thus dealt with:

"*Of course, it is beyond the power of a Court to instruct a jury to return a verdict of guilty in a criminal case, either directly or indirectly by the use of language which amounts to the direction of a verdict.* The Constitution of the United States guarantees every person charged with crime the right of trial by jury. Art. III, sec. 2, cl. 3, 6th Amendment. This right can not be taken away by the legislative department of the Government, much less by the judicial. *It would be a judicial frittering away of the citizens' constitutional rights to hold that the charge of the Court in this case did not amount to a direction to return a verdict of guilty.* Juries are composed of men of average intelligence, who have to depend upon the Court for guidance in the performance of their duties. Every word that falls from the lips of the trial judge is accepted, and under all ordinary circumstances acted upon, by the jury. *In this instance, what the Court did amounted to taking from the jury all questions of fact, and charging them that, under the law, it was their duty to find the defendant guilty.* In Breese vs. United States, 48 C. C. A., 36, 108 Fed., 804, a case very similar to the one at bar, the trial judge, after expressing the opinion in the charge that the defendant was guilty, and that it was the duty of the jury to so find, charged the jury at great length that his opinion was not theirs, and that they were the sole judges of the facts, and should determine the guilt or innocence of the defendant independently of any opinion expressed by him. The Court of Appeals, reversing the case, said: 'But, inasmuch

as the strong opinion expressed by the judge below in his charge to the jury, in which he used the words, "that, in his opinion, it was the duty of the jury to convict the defendant," was calculated to mislead the jury, who perhaps construed this language as a direction on the part of the Court, we think it would be proper to grant a new trial.'

"*The instruction in the present case constitutes reversible error.* It is not a case of the Court summing up an issue of fact, and charging the jury that if they find certain facts to be true, they should find the accused guilty; and then summing up the facts upon the other side, and charging that, if they should find those facts to be true, they should acquit the accused. *No question of fact was here submitted to the jury. The court stated that no issue of fact existed, and applying the law to the facts thus found by the Court to be established, declared that the defendants were guilty, and instructed the jury that it ought so to find. Indeed, the instruction was so explicit that the jury would have been justified in regarding it as a direct violation of the mandate of the Court had it returned a verdict of not guilty.* The trial judge 'should take care to separate the law from the facts, and to leave the latter in unequivocal terms to the judgment of the jury as their true and peculiar province. * * * It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling'. Starr vs. United States, 153 U. S., 614, 625, 626, 38 L. ed., 814, 845, 846, 14 Sup. Ct. Rep. 919."

Masters vs. United States., 42 App. D. C., 350, 353-5.

On the hearing below it was deemed sufficient to quote without comment the observation of the Police Court upon this opinion, when overruling the motion for a new trial, as follows:

> "When you read the Masters case you will see that they reversed the conviction in that case upon the ground that there was some evidence which raised an issue of fact. The question came up in that case as to the admissibility of evidence as to the intent with which the defendant acted. The Appellate Court decided that the trial court erred in not admitting that testimony. *In that state of the case, for the purpose of the opinion, the record stood as if that testimony had been admitted,* and with that testimony in, there certainly was evidence there as to whether or not the man had committed an offense. *That opinion, and the language used in it, is based upon that fact.*" (Rec., 43-4, f. 43.)

But the confidence of counsel in the premises proved to be misplaced, for in its opinion affirming the judgment of the Police Court herein the Court below spoke thus of its holding in the Masters case (Rec., 51, f. 53):

> "We held in that case that error was committed *in refusing to admit certain testimony,* which, if admitted, would have presented a sharp issue of fact for the jury."

It would perhaps be lacking in deference to say that nothing could be further from accuracy.

The opinion in the Masters case is perfectly clear, perfectly simple. Says the Court therein, "The *instruction* in the present case"—not any *refusal to admit testimony*—"constitutes reversible error;" and

then the Court, quite superfluously, if charitably, adds (42 App. D. C. 355):

> "The Court fell into this error in interpreting the statute to mean that the mere conversion of the funds constituted a wrongful conversion, and therefore the question of criminal intent was not an element of the crime to be proven as in a common law felony."

And this the Court, after discussion of the relation of intent to the offense under consideration, followed by remarking (42 App. D. C. 357):

> "It was error, therefore, for the Court to refuse to permit counsel for defendants to argue the question of criminal intent to the jury, and thereby withdraw from the consideration of the jury the evidence offered to establish the good reputation of defendants for honesty and integrity. Such evidence is always admissible in a criminal trial upon the question of intent."

Too obviously for discussion, what the Court "held in that case" is that

> "it is beyond the power of a Court to instruct a jury to return a verdict of guilty in a criminal case either directly or indirectly by the use of language which amounts to the direction of a verdict,"

and however the trial Court came to violate this principle is wholly unimportant:

The decision is, that even in a case in which the Court so limits the evidence as to preclude a controversy of fact, the principle may not be violated.

And out of the respective utterances of the Police Court and the Court below on the opinion in the Masters case very clearly arises the question, which of the two Courts more plainly misconceived and more pointedly misstated the matter actually considered and decided? but this question it is not conceived to be the duty of counsel to consider, much less to decide.

That the Police Court plainly violated the rights of defendant in the particular under consideration is clear from the quotations from that Court above appearing (*Ante*, pp. 27-8).

And that in affirming the judgment herein the Court below not only equally clearly violated those rights but also misinterpreted the charge in question, is abundantly evident from the conclusion of its opinion, as follows (Rec., 52-3, ff. 54-6):

> "*There was no lawful power vested in the jury to acquit defendant.* In convicting him, no right of his was violated, since he had no right to an acquittal. The right of trial by jury guaranteed by the Constitution is the right to a lawful trial where the jury is governed in its deliberations by the law as given by the court. Every general verdict is compounded both of law and fact—the law as given by the court, and the facts as adduced from the witness stand. The jury has the physical power to disregard both, but not the moral right. In the absence of any issue of fact, as here, only a question of law remains; and while the jury has the arbitrary power to disregard it, one failing to profit by such a disregard of duty is not in position to complain.
>
> "The right guaranteed the citizen is to be tried according to the fixed law of the land, and not according to the mere guess of a jury in the exer-

cise of purely arbitrary power. If denied the former, he has suffered an injury from which the law will grant relief; if granted the latter, he is the recipient of a gross miscarriage of justice; but, if denied it, he has been deprived of no legal or constitutional right of which he may be heard to complain.

"The court in charging the jury that a failure to return a verdict of guilty could be due only to 'a wilful and flagrant disregard of the evidence and the law * * *, and a violation of their obligation as jurors,' stated the truth, *and at the same time the law of this case.* It is clear that, unless the jury violated their obligations as pointed out by the court, they could not acquit the defendant. *The jury, however, was not divested of the freedom to exercise arbitrary power. On the contrary, it was expressly told that it possessed that power.* Hence, in order that we may reverse the case, it must appear not only that the jury was not permitted to exercise arbitrary power and 'disregard the evidence and the principles of law applicable to the case,' or that some other right of defendant has been infringed. The record fails to disclose either. *It is not apparent, therefore, that any error prejudicial to defendant was committed.*"

Horning v. District of Columbia., 48 App. D. C. 380, 386-7.

Nor was the allusion by the Police Court and the Court below to the case of Sparf v. United States conspicuously felicitous.

In that case Sparf and another were jointly indicted for murder and tried together. On the trial the admission in evidence of a declaration in the nature of a con

fession made by his codefendant was complained of by Sparf and assigned in his behalf as error. And the trial court instructed the jury in effect that the defendants should, if convicted, be found guilty of murder only and not of a less offense, upon the ground that there was no evidence upon which any verdict could be properly returned, except one of guilty or one of not guilty of the particular offense charged.

Both defendants were found guilty of murder and sentenced to be hanged, and the judgment was reversed as to Sparf because of the erroneous admission of his codefendant's confession, but sustained as to his codefendant upon the ground that it was not error in the trial court to take from the jury consideration of a less offense.

The decision was by a divided court, and the chief question discussed in the two principal opinions—that of Mr. Justice Harlan, speaking for the Court, and that of Mr. Justice Gray, speaking for himself and Mr. Justice Shiras in dissent—was whether in a criminal case a jury is the judge of both law and fact or must take the law as given it by the Court; in other words, whether a Court has the right to control a jury even in matter of law. The decision was that in the courts of the United States it is the duty of juries in criminal cases to take the law from the court and apply that law to the facts as they find them to be from the evidence. In the course of two opinions mentioned, the whole subject is very fully discussed and each opinion will repay careful and repeated perusal. That of Mr. Justice Harlan is illustrative of his well-known thoroughness and patience, and that of Mr. Justice Gray, covering approximately seventy-three pages, may fairly be characterized as conspicuously one of the

ablest of dissenting opinions to be found in the reports of this Court.

But while the Court was divided in opinion as to affirming or reversing the judgment against Sparf, there was no division of opinion upon the question under immediate consideration.

This is made clear beyond all room for doubt by the following extracts from the respective opinions mentioned.

From the opinion of the Court:

> "We have said that with few exceptions, the rules which obtain in civil cases in relation to the authority of the Court to instruct the jury upon all matters of law arising upon the issues to be tried, are applicable in the trial of criminal cases. The most important of those exceptions is that it is not competent for the court, in a criminal case, to instruct the jury peremptorily to find the accused guilty of the offense charged or of any criminal offense less than that charged. The grounds upon which this exception rests were well stated by Judge McCrary, Mr. Justice Miller concurring, in United States v. Taylor, 3 McCrary, 500, 505. It was there said: 'In a civil case, the Court may set aside the verdict, whether it be for the plaintiff or defendant, upon the ground that it is contrary to the law as given by the Court; but in a criminal case, if the verdict is one of acquittal, the Court has no power to set it aside. It would be a useless form for a court to submit a civil case involving only questions of law to the consideration of a jury, where the verdict, when found, if not in accordance with the Court's view of the law, would be set aside. The same result is accomplished by

an instruction given in advance to find a verdict in accordance with the Court's opinion of the law. But not so in criminal cases. A verdict of acquittal can not be set aside; and therefore, if the Court can direct a verdict of guilty, it can do indirectly that which it has no power to do directly' " (pp. 105-6).

From the dissenting opinion of Mr. Justice Gray:

"In civil cases, doubtless, since the power to grant new trials has become established, the Court having the right to grant one to either party as often as the verdict appears to be contrary to the law, or to the evidence, may, in order to avoid unnecessary delay, whenever in its opinion the evidence will warrant a verdict for one party only, order a verdict accordingly. Pleasants v. Fant, 89 U. S., 22 Wall., 116; Hendrick v. Lindsay, 93 U. S., 143; Schofield v. Chicago, M. & St. P. R. Co., 114 U. S., 615.

"But a person accused of crime has a twofold protection, in the Court and the jury, against being unlawfully convicted. If the evidence appears to the Court to be insufficient in law to warrant a conviction, the Court may direct an acquittal. Smith v. United States, 151 U. S., 50. But the Court can never order the jury to convict; for no one can be found guilty, but by the judgment of his peers" (p. 174).

"This is not a case in which the judge simply declined to give any instructions upon a question of law which he thought did not arise upon the evidence. But, after giving sufficient definitions, both of murder and of manslaughter, he peremptorily told them that they could not convict the defendants of manslaughter only, and thereby denied the right of the jury to pass upon a matter

of fact necessairly included in the issue presented by the general plea of not guilty.

"This appears to us to be inconsistent with settled principles of law, and with well considered authorities" (p. 177).

"For the twofold reason that the defendants, by the instructions given by the Court to the jury, have been deprived, both of their right to have the jury decide the law involved in the general issue, and also of their right to have the jury decide every matter of fact involved in that issue, we are of opinion that the judgment should be reversed, and the case remanded with directions to order a new trial as to both defendants" (pp. 182-3).

Sparf v. United States, 156 U. S., 51.

For the error alone thus appearing the judgment of the Court below should be reversed.

5. It remains only to consider the assignment of error based upon the refusal to grant defendant's motion to discharge the jury from further consideration of the case, upon the ground that the effect of the Police Court's action pointed to by the assignment was to coerce the jury to render a verdict of guilty. (Rec., 41-2.)

The same considerations which demand the conclusion that the error last above treated is plain and reversible lead to the same conclusion respecting this assignment, and the same may, therefore, safely be submitted without further comment.

Respectfully submitted,

HENRY E. DAVIS,
Attorney for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 924.

GEORGE D. HORNING, PETITIONER,

vs.

THE DISTRICT OF COLUMBIA, RESPONDENT.

BRIEF ON BEHALF OF RESPONDENT.

STATEMENT OF THE CASE.

George D. Horning was convicted in the police court of the District of Columbia of a misdemeanor, for engaging, in said District, in the business of loaning money on security upon a rate of interest greater than 6 per cent per annum, in violation of the Act of February 4, 1913 (37 Stat. L., 657), and was sentenced to pay a fine of $50.

The record discloses that an information was filed against Horning, charging this offense in great detail, which information was quashed by the judge of the police court, upon the ground that, as matter of law, the facts therein set forth did not constitute an offense under the Act aforesaid.

On writ of error allowed to the District of Columbia, the Court of Appeals examined the information, held that the facts charged therein did constitute a violation of said Act of Congress, and remanded the case to the police court for further proceedings.

Thereafter the case came on for trial, and defendant therein demanded a trial by jury, and from a verdict of guilty and judgment thereon was allowed a writ of error to the Court of Appeals, which affirmed the judgment and sentence aforesaid. His petition to this Honorable Court for a writ of certiorari to the Court of Appeals of the District of Columbia to review its action upon the second writ of error was granted, and the case is now here for review of the charge of the trial judge.

ARGUMENT.

Counsel for petitioner complains:

1. That the verdict of the jury in the police court was coerced.

2. That error was committed in refusing certain instructions prayed on behalf of defendant in the police court, which, if granted, would have presented issues of fact.

Concerning the first error alleged, the opinion of the Court of appeals disposes thereof, adversely to the contentions of petitioner, in such a thorough and convincing manner that it would be presumptuous on the part of counsel for the District of Columbia to attempt any addition to or improvement upon the argument contained in the opinion itself. The opinion makes it perfectly clear that petitioner complains to this court, not that he did not receive a *fair* trial by an *impartial* jury in the police court, but because he did not receive an *unfair* trial, by a *partial* jury, acquitting him of an offense the commission of which he admitted when testifying as a witness in his own behalf.

Petitioner possesses the unique distinction of having entered a formal plea of not guilty of the offense charged against him, demanded a jury trial, and then taken the witness stand and testified to the commission by him of every act charged against him in the information, and determined by the Court of Appeals to constitute, as matter of law, the offense charged. A parallel case would be for a defendant, charged with assault with a dangerous weapon, to plead not guilty, and then testify that he deliberately shot at the prosecuting witness, with a revolver, without any provocation or extenuating circumstances; and, nevertheless, ask a verdict of acquittal and then complain if the jurors performed their plain duty, and brought in a verdict of guilty.

An examination of the record in this case, and particularly of the testimony of petitioner himself and of the witnesses called on his behalf, removes every possibility of doubt as to his guilt, and demonstrates beyond question that he is not complaining of a miscarriage of justice, but because one did not take place for his benefit.

Counsel for petitioner states in his brief that no one of the five elements of petitioner's business was admitted by his testimony to have been carried on in the District of Columbia.

The five elements referred to are set forth in the opinion of the Court of Appeals upon the first appeal to that court in this case, reported in 47 App. D. C., 413, in the following language:

> "The business of a pawnbroker, as conducted by defendant through his combined District and Virginia offices, consists of a number of elements: (1) a place where applications for loans are made; (2) the application for the loan; (3) the disclosure of the security; (4) the appraisement of the security; (5) the agreement for the loan and for its repayment; (6) the payment of the money to the borrower and the delivery of the pledge to the broker; (7) the safekeeping by the pledgee of the property pledged; (8) the payment of the loan, with agreed interest, and,

(9) the return of the pledge. It will be observed that of the elements entering into the transaction five of the nine (1, 2, 3, 7 and 9) were performed in the Washington office."

That the Court of Appeals accurately stated the facts concerning the transaction, in the District of Columbia, of the elements referred to, appears from the record of the testimony introduced on behalf of the defendant, as follows:

1. A Place Where Applications for Loans are Made.

Defendant's witness Leatherman testified, on cross-examination, that he was in defendant's employ from February 1st to July 13th, 1917; that during that period persons would come to defendant's place of business at 9th and D streets northwest, and say that they desired to secure loans on articles of personal property; that he would tell them that no loans were made in the District, and no appraisements, but that they could go to defendant's office in Virginia, from the 9th and D Street office, in one of defendant's automobiles, free of charge, or could utilize the Dime Messenger Service to send over their pledges, or to send over their pawn tickets for the purpose of redeeming pledges; that there were always two cars, and sometimes three, utilized for this purpose, and witness would call in the chauffeur and tell him to make the trip. When borrowers wanted to redeem their loans—many of them, probably seventy-five to one hundred per day, came in during the period above mentioned—the witness would tell them that pledges could not be redeemed in Washington, but that this would have to be done in Virginia, and that if they desired they could go to the Virginia office in one of defendant's automobiles, or could utilize the Dime Messenger Service, which was there at their disposal; numbers of them would go over in the free automobile service and numbers would utilize the Dime Messenger boys. That was the manner of conducting the business during the

period above mentioned. Among the people who came there during this period of time some were the same coming in time after time, regular customers (R., 28-30).

Defendant's witness Columbus testified, on cross-examination, that there was telephonic communication between defendant's Virginia and Washington offices, and that the telephone was frequently used between said offices in matters concerning defendant's business (R., 33).

Defendant himself testified, on cross-examination, that from February 1st to July 13th, 1917, he was familiar with the operations of the Washington office; that during this period he received in Virginia from the Washington office, through the Dime Messenger Service, from fifty to seventy-five applications per day.

2. The Application for the Loan.

The witness Leatherman also testified that applications for loans were made at defendant's place of business at 9th and D streets northwest (R., 29), and that among the people who came there during the period inquired about were some persons who came in time after time, regular customers. To the same effect is the testimony of the defendant already cited.

3. The Disclosure of the Security.

That the articles desired to be pledged were exhibited at the defendant's Washington office appears from the testimony of his witness Leatherman, and defendant himself testified to his familiarity with the method of conducting his business, as already stated.

7. The Safe-keeping by the Pledgee of the Property Pledged.

That petitioner maintained his Washington office as a place in which to store pledges was testified to by Leatherman

(R., 27-28) and by defendant, who stated that he "selected Washington as his storehouse because he had an office there that is well equipped for taking care of those pledges (R., 34).

9. The Return of the Pledge.

Leatherman also testified that articles stored in the Washington warehouse were delivered only by warehouse receipts coming from defendant's Virginia office; that upon presentation of the warehouse receipts to witness he delivered the articles called for and filed away the original redemption tickets (R., 28-29). Petitioner's witness Columbus also testified that "the borrower gets the article itself at the warehouse at 9th and D, unless he requests it to be sent to Virginia and delivered over there * * *." Defendant also testified to the redemption and delivery of pledges at his Washington office and to the use of the latter office as a warehouse for pledges (R., 34).

The above references to the testimony are limited to the evidence offered on behalf of petitioner, which was in exact accord with that introduced by the District of Columbia; and concerning these vital matters there was, as stated in the opinion of the Court of Appeals, no conflict whatever in the testimony and nothing for the jury to determine.

The Court of Appeals said, "Defendant, by his testimony, admitted the facts as completely as he could have done by a plea of guilty," and then pertinently inquires, "How far may a defendant rely upon the exercise of arbitrary power by a jury and complain if the jury disappoints his expectations?"

As to the second contention advanced by petitioner, that the refusal of his instructions deprived him of the benefit of issues of fact which would have been presented to the jury by such instructions:

The Court of Appeals had considered all of the facts involved in the charge against petitioner, which were set out

in detail in the information reviewed by that court upon the first writ of error, and which were identically the same facts proved before the jury, and admitted by petitioner.

What he really sought by the instructions requested, was to have the jury reach a different conclusion as to his guilt from that which the Court of Appeals had declared would follow the proof of the facts alleged in the information, and, in effect, to have the jury review and overrule the Court of Appeals upon matters of law.

He now complains because, although he testified to the commission of every act which the Court of Appeals declared to constitute the offense with which he was charged, the jury was not permitted to consider whether these acts did constitute a violation of the law, in spite of the opinion of the Court of Appeals that they did.

The statement of such a proposition contains its own refutation.

We confidently submit that no cause has been shown sufficient to reverse the decision of the Court of Appeals in this case.

Respectfully submitted,

F. H. STEPHENS,
P. H. MARSHALL,
Attorneys for Respondent.

HORNING v. DISTRICT OF COLUMBIA.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 77. Argued November 8, 9, 1920.—Decided November 22, 1920.

One whose intentional conduct violates the prohibitions of a penal statute is not excused by his purpose to keep within the law and his belief that he did so. P. 137.

The offense of engaging without license in the business of lending money on security at more than 6 per cent. interest, in the District of Columbia (Act of February 4, 1913, c. 26, 37 Stat. 657), is committed by a pawnbroker who receives applications, examines pledges and decides upon loans only at a place just beyond the District line, but who maintains an establishment in the District where the pledges are kept and returned, and where intending borrowers may find a free automobile service to take them to him in person, or a paid messenger service, not belonging to the pawnbroker, by which their applications and pledges may be taken to him and the money and pawn tickets brought back and delivered to them. *Id.*

In a criminal case, when undisputed facts, including the testimony of the defendant, clearly establish the offense charged, the judge may say so to the jury, tell them that there is no issue of fact for their determination and instruct them that, while they cannot be constrained to return a verdict of guilty, it is their duty to do so under their obligation as jurors. *Id.*

Held, that if the defendant suffered any wrong from the manner in which such instructions were given in the present case, it was purely formal, since there could be no doubt of his guilt on the facts admitted; and the error, if any, was cured by § 269, Jud. Code, as amended February 26, 1919. P. 138.

48 App. D. C. 380, affirmed.

THE case is stated in the opinion.

Mr. Henry E. Davis for petitioner.

Mr. Robert L. Williams, with whom *Mr. F. H. Stephens* and *Mr. P. H. Marshall* were on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the court.

This case comes here upon a writ of certiorari granted to review a judgment of the Court of Appeals that affirmed a conviction of the petitioner of doing business as a pawnbroker and charging more than six per cent. interest, without a license, which is forbidden by the Act of Congress of February 4, 1913, c. 26, 37 Stat. 657. 48 App. D. C. 380.

The external facts are not disputed. The defendant had been in business as a pawnbroker in Washington but anticipating the enactment of the present law removed his headquarters to a place in Virginia at the other end of a bridge leading from the city. He continued to use his former building as a storehouse for his pledges but posted notices on his office there that no applications for loans would be received or examination of pledges made there. He did, however, maintain a free automobile service from there to Virginia and offered to intending borrowers the choice of calling upon him in person or sending their application and security by a dime messenger service not belonging to him but established in his Washington building. If the loan was made, in the latter case the money and pawn ticket were brought back and handed to the borrower in Washington. When a loan was paid off the borrower received a redemption certificate, presented it in Washington and got back his pledge. The defendant estimated the number of persons applying to the Washington office for loans or redemption at fifty to seventy-five a day. His Washington clerk, a witness in his behalf, put it at from seventy-five to one hundred. We may take it that there was a fairly steady stream of callers, as is implied by the automobile service being maintained. It is said with reference to the charge of the judge to which we shall advert that there was a question

for the jury as to the defendant's intent. But we perceive none. There is no question that the defendant intentionally maintained his storehouse and managed his business in the way described. It may be assumed that he intended not to break the law but only to get as near to the line as he could, which he had a right to do, but if the conduct described crossed the line, the fact that he desired to keep within it will not help him. It means only that he misconceived the law.

As to whether the conduct described did contravene the law, it is urged that a pledgee has a right to keep the pledged property where he likes and as he likes provided he returns it in proper condition when redeemed. But that hardly helps the defendant. To keep for return, whatever latitude there may be as to place and mode, is part of the duty of a pledgee, and in the case of one who makes a business of lending on pledges is as much a part of his business as making the loan. As we read the statute its prohibition is not confined to cases where the whole business is done in Washington. If an essential part of it is done there and a Washington office is used as a collecting centre, it does not matter that care is taken to complete every legal transaction on the other side of the Potomac. We cannot suppose that it was intended to allow benefits so similar to those coming from business done wholly in the city to be derived from acts done there and yet go free. We are of opinion that upon the undisputed evidence the defendant was guilty of a breach of the law and turn at once to the question which seemed to warrant allowing the case to be brought to this Court.

The question relates to the charge of the judge. The judge said to the jury that the only question for them to determine was whether they believed the concurrent testimony of the witnesses for the Government and the defendant describing the course of business that we have stated and as to which there was no dispute. Those facts,

he correctly instructed them, constituted an engaging in business in the District of Columbia. This was excepted to and the jury retired. The next day they were recalled to Court and were told that there really was no issue of fact for them to decide; that they were not warranted in capriciously saying that the witnesses for the Government and the defendant were not telling the truth; that the course of dealing constituted a breach of the law; that it was their duty to accept this exposition of the law; that in a criminal case the Court could not peremptorily instruct them to find the defendant guilty but that if the law permitted he would. The Court added that a failure to bring in a verdict could only arise from a flagrant disregard of the evidence, the law, and their obligation as jurors. On an exception being taken the judge repeated that he could not tell them in so many words to find the defendant guilty but that what he said amounted to that; that the facts proved were in accord with the information and that the Court of Appeals had said that that showed a violation of law.

This was not a case of the judge's expressing an opinion upon the evidence, as he would have had a right to do. *Graham* v. *United States*, 231 U. S. 474, 480. The facts were not in dispute, and what he did was to say so and to lay down the law applicable to them. In such a case obviously the function of the jury if they do their duty is little more than formal. The judge cannot direct a verdict it is true, and the jury has the power to bring in a verdict in the teeth of both law and facts. But the judge always has the right and duty to tell them what the law is upon this or that state of facts that may be found, and he can do the same none the less when the facts are agreed. If the facts are agreed the judge may state that fact also, and when there is no dispute he may say so although there has been no formal agreement. Perhaps there was a regrettable peremptoriness of tone—

but the jury were allowed the technical right, if it can be called so, to decide against the law and the facts—and that is all there was left for them after the defendant and his witnesses took the stand. If the defendant suffered any wrong it was purely formal since, as we have said, on the facts admitted there was no doubt of his guilt. Act of February 26, 1919, c. 48, 40 Stat. 1181, amending § 269 of the Judicial Code; Act of March 3, 1911, c. 231, 36 Stat. 1087.

Judgment affirmed.

MR. JUSTICE MCREYNOLDS dissents.

MR. JUSTICE BRANDEIS, dissenting.

It has long been the established practice of the federal courts that, even in criminal cases, the presiding judge may comment freely on the evidence and express his opinion whether facts alleged have been proved. Since *Sparf* v. *United States*, 156 U. S. 51, it is settled that, even in criminal cases, it is the duty of the jury to apply the law given them by the presiding judge to the facts which they find. But it is still the rule of the federal courts that the jury in criminal cases renders a general verdict on the law and the facts; and that the judge is without power to direct a verdict of guilty although no fact is in dispute. *United States* v. *Taylor*, 11 Fed. Rep. 470; *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 172 Fed. Rep. 194. What the judge is forbidden to do directly, he may not do by indirection. *Peterson* v. *United States*, 213 Fed. Rep. 920. The judge may enlighten the understanding of the jury and thereby influence their judgment; but he may not use undue influence. He may advise; he may persuade; but he may not command or coerce. He does coerce when without convincing the judgment he overcomes the will by the weight of his authority. Compare *Hall* v. *Hall*, L. R. 1, P. & D. 481, 482.

The character of the charge in this case is illustrated by the following paragraph:

"In conclusion, I will say to you that a failure by you to bring in a verdict in this case can arise only from a wilful and flagrant disregard of the evidence and the law as I have given it to you, and a violation of your obligation as jurors. . . . Of course, gentlemen of the jury, I cannot tell you, in so many words, to find defendant guilty, but what I say amounts to that."

In my opinion, such a charge is a moral command, and being yielded to, substitutes the will of the judge for the conviction of the jury. The law which in a criminal case forbids a verdict directed "in so many words," forbids such a statement as the above.[1]

It is said that if the defendant suffered any wrong it was purely formal; and that the error is of such a character as not to afford, since the Act of February 26, 1919, c. 48, 40 Stat. 1181, a basis for reversing the judgment of the lower court. Whether a defendant is found guilty by a jury or is declared to be so by a judge is not, under the Federal Constitution, a mere formality. *Blair* v. *United States*, 241 Fed. Rep. 217, 230. The offence here in question is punishable by imprisonment. Congress would have been powerless to provide for imposing the punishment except upon the verdict of the jury. *Callan* v. *Wilson*, 127 U. S. 540; *Thompson* v. *Utah*, 170 U. S. 343. I find nothing in the act to indicate that it sought to do so.

Because the presiding judge usurped the province of the jury, I am unable to concur in the judgment of the court.

THE CHIEF JUSTICE and MR. JUSTICE DAY concur in this dissent.

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[1] Compare *People* v. *Sheldon*, 156 N. Y. 268; *State* v. *Bybee*, 17 Kan. 462; *Meadows* v. *State*, 182 Ala. 51; *Randolph* v. *Lampkin*, 90 Ky. 551; *McPeak* v. *Missouri Pacific Ry. Co.*, 128 Mo. 617; *State* v. *Tulip*, 9 Kan. App. 454; *Lively* v. *Sexton*, 35 Ill. App. 417. See *Starr* v. *United States*, 153 U. S. 614, 626.